Supreme Court, U.S.
FILED
JUL 12 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK, JR.
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 1
Question Presented 2
Constitutional Provision and Statutes Involved 2
Statement of the Case 3
The Question Is Substantial 8
Conclusion 13
Appendix "A"—Opinion of the Supreme Court of Mississippi A1
Appendix "B"—Opinion of the Chancery Court of Hinds County, Mississippi A8
Appendix "C"—Chancery Court Decree A12
Appendix "D"—Judgment of the Supreme Court of Mississippi A14
Appendix "E"—Notice of Appeal to the Supreme Court of the United States A16
Appendix "F"—Section 27-65-19, Miss. Code of 1972, Annotated A18

Table of Authorities

CASES

Colonial Pipeline Co. v. *Traigle*, 421 U. S. 100 (1975) 2, 9, 10, 11, 12, 13
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 (1921) 2
Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662 (1949) 10, 11
Railway Express, Inc. v. *Virginia* (*Railway Express I*), 347 U. S. 359 (1954) 9, 10, 11

Railway Express, Inc. v. *Virginia* (*Railway Express II*), 358 U. S. 434 (1959) 9
Spector Motor Service v. *O'Connor*, 340 U. S. 602 (1951) 8, 9, 10, 11, 12, 13

CONSTITUTIONAL PROVISION AND STATUTES

Article I, § 8, cl. 3, Constitution of the United States 2
Mississippi Code of 1942—
Section 10105 (Codified as Section 27-65-13, Mississippi Code of 1972, Annotated, Vol. 9) 3
Section 10109 (2) (Codified as Section 27-65-19, Mississippi Code of 1972, Annotated, Vol. 9) 3
Section 10121.1 (Codified as Section 27-65-47, Mississippi Code of 1972, Annotated, Vol. 9) 1
1972 Laws of the State of Mississippi, Chapter 506 3
28 U. S. C. § 1257 (2) 2

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

COMPLETE AUTO TRANSIT, INC.,
Appellant,
vs.
CHARLES R. BRADY, JR., CHAIRMAN MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi (Appendix "A") is reported at 330 So. 2d 268. The opinion of the Chancery Court of Hinds County, Mississippi (Appendix "B") is not reported.

JURISDICTION

This action was commenced in the Chancery Court of Hinds County, Mississippi, pursuant to Section 10121.1, Mississippi Code of 1942 (now codified as Section 27-65-47, Mississippi Code of 1972, Annotated, Vol. 9, page 52) seeking a refund of privilege

taxes assessed against Appellant Complete Auto Transit, Inc. The decree of the Chancery Court upholding the assessment was entered on August 6, 1974 (Appendix "C"). Upon timely appeal, the order of the Chancery Court was affirmed by the Supreme Court of the State of Mississippi, which held that the privilege tax statute was constitutionally valid as applied to Complete Auto Transit, Inc. The judgment of the Mississippi Supreme Court affirming the trial court's determination was entered on April 13, 1976 (Appendix "D"). Notice of appeal was filed in the Mississippi Supreme Court on June 9, 1976 (Appendix "E") This Court has jurisdiction of this appeal pursuant to 28 U. S. C. § 1257(2). *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921); *Colonial Pipeline Co.* v. *Traigle,* 421 U. S. 100 (1975).

QUESTION PRESENTED

The following question is presented by this appeal:

Whether the state of Mississippi may constitutionally impose a tax on the Appellant for the privilege of engaging in exclusively interstate commerce.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal is predicated upon the Interstate Commerce Clause of the Constitution of the United States (Art. 1, § 8, cl. 3), which provides that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The following statutes were in effect at all times relevant to this litigation:

Section 10105 of Mississippi Code of 1942 (now codified as Section 27-65-13, Mississippi Code of 1972, Annotated, Vol. 9, page 12), which reads as follows:

> There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

and Section 10109 (2), Mississippi Code of 1942 (codified as Section 27-65-19 (2), Mississippi Code of 1972, Annotated, Vol. 9, page 20, Appendix "F"),* which provided in part as follows:

> Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent (5%) of the gross income of such business. . . .

STATEMENT OF THE CASE

This case involves an assessment for privilege taxes imposed upon Appellant Complete Auto Transit, Inc. (Complete Auto), a Michigan corporation. Pursuant to authority granted by the Interstate Commerce Commission, Complete Auto operates in every state

---

*The statute was amended effective as of August 1, 1972 so as to exclude the transportation of property. 1972 Laws of the State of Mississippi, Chapter 506. The statute as amended appears in Mississippi Code of 1972, Annotated, Supp. to Vol. 9, pages 14-15.

in the United States, with the exception of Alaska and Hawaii. Complete Auto is engaged in the business of transporting motor vehicles (cars and trucks) by motor carrier for General Motors Corporation (General Motors). All of the vehicles involved in this case were shipped by General Motors from various assembly points located outside of the State of Mississippi to designated General Motors dealers in the State of Mississippi. The vehicles were shipped to the dealers in Mississippi via rail for a portion of the journey; the transportation was completed by Complete Auto. The interchange between the rail carrier and Complete Auto took place at a railhead ramp in Jackson, Mississippi.

The State Tax Commission, acting under Sections 10105 and 10109 (2), set out hereinabove, assessed a privilege tax on Complete Auto, measured by the gross revenues earned by Complete Auto for transporting the vehicles from the railhead in Jackson, Mississippi, to the various General Motors dealers located in Mississippi. (No tax was assessed on any portion of the gross income received by Complete Auto for transporting vehicles from the Jackson, Mississippi railhead to dealers located outside the State of Mississippi). The assessment was predicated on the State Tax Commission's position that the transportation of the vehicles from Jackson to the dealers in Mississippi constituted intrastate commerce. The assessment was in the amount of $167,375.30, for the period August 1, 1968 through July 31, 1972. It is undisputed that the tax levied constituted a tax on the *privilege* of conducting the business.

Upon the trial of the case, the following undisputed facts were established.

Pursuant to its agreements with various General Motors dealers located within the State of Mississippi and elsewhere, General Motors was obligated to manufacture motor vehicles as specifically ordered by each of the dealers and to deliver these vehicles to the dealer at the dealer's location (R. 83). All of the motor vehicles were manufactured at plants located outside of the State of Mississippi (R. 85).

When an order for a particular vehicle was received by General Motors from a dealer, the vehicle was assembled. General Motors then made the decision as to which carrier or carriers would be used to transport the vehicle to the dealer. Since the contract required General Motors to deliver the automobiles at each dealer's location (showroom), it was necessary that the delivering carrier be a motor carrier rather than a rail carrier; in fact, many of the vehicles were transported the entire distance by a motor carrier. However, when greater distances from the assembly point to the delivery points were involved, it was more economical to utilize rail transportation where possible (R. 87). Accordingly, General Motors often used rail carriers for a portion of the journey, and motor carriers, either common or contract, for the last portion of the journey (R. 88).

All transportation arrangements were made before the vehicle was shipped from the assembly plant; prior to shipment each vehicle was labelled and identified with respect to the particular dealer to whom the vehicle was to be delivered (R. 95). Indeed, General Motors billed the dealer for the automobile when the vehicle was delivered to the railroad (R. 104). Once a vehicle was delivered to the carrier, General Motors

had absolutely nothing further to do with the vehicle. The vehicle was in the care, custody, and control of the carriers from that point until the vehicle was delivered to the dealer. Transportation charges for transportation to the dealer's location were paid by General Motors, and General Motors was reimbursed by the dealer for this cost (R. 104). Thus, it is clear from the record that the destination of each vehicle was clearly identified at the time that it was delivered to the railroad, and there is no evidence in the record which indicates that any vehicle was ever diverted from the originally designated destination.

After the rail carrier portion of the journey was completed, the rail carrier transferred the vehicle directly to the motor carrier in Jackson, Mississippi (R. 100). No representative of General Motors was present at the interchange from the rail carrier to the motor carrier (R. 132).

The mechanics for working out the interchange of the vehicles at Jackson were that Complete Auto rented a small parcel of land, together with a small office located thereon, from the railroad (R. 126). When the vehicles arrived in Jackson on railcars, they were unloaded by the railroad and placed on railroad property. As soon as practicable, usually within twenty-four to forty-eight hours, a representative of Complete Auto, together with a representative of the railroad, would inspect each vehicle to see if it had sustained any damage during the rail portion of the journey. If the vehicle was not damaged, it was turned over by the railroad representative to Complete Auto for the continuation of the transportation to the dealer (R. 117). If the vehicle had been damaged, this was noted on a document signed by a representative of the rail carrier and a representative of Complete Auto, and the vehicle was then transferred to Complete Auto for completion of the journey to the dealer (R. 130-32). During the period of time involved in this case, an average of approximately 300 vehicles per day were transferred by the rail carrier to Complete Auto at the Jackson interchange point (R. 101).

The assessment of the tax at issue here was predicated on the State Tax Commission's position that the continuation of the transportation of automobiles from Jackson to the dealers' locations in Mississippi was intrastate commerce. The original pleading filed by Complete Auto in this cause alleged that the activities constituted interstate commerce and, therefore, were not subject to the tax (Paragraph 5, Bill of Complaint, R. 6). The case presented in the trial court centered on the factual question—whether the operations of Complete Auto consisting of transporting automobiles from Jackson to various dealers' locations in Mississippi constituted interstate or intrastate commerce.

The opinion of the trial court (Appendix "B") held that the tax could be constitutionally imposed even though the activities constituted interstate commerce, since all of the income upon which the tax could be imposed was derived from transportation within the State of Mississippi. Thus, the constitutional question presented by this appeal formed the basis for the holding of the trial court.

On appeal, Complete Auto raised two issues: first, whether its activities were purely and solely interstate commerce; and second, whether the state could constitutionally impose a privilege tax on purely interstate commerce.

As to the first issue, Complete Auto reiterated its position that the transportation sought to be taxed was an integral part of continuous interstate movement, although it clearly appears that the trial court had determined that the activities of Complete Auto were of an interstate character (See Opinion of the Chancery Court, Appendix "B"). In basing its decision on the constitutional issue, the Mississippi Supreme Court necessarily determined that the activities of Complete Auto were of an interstate character.

As to the second issue, the Supreme Court affirmed the trial court. In upholding the validity of the statute the Mississippi Supreme Court held that a state can constitutionally impose a privilege tax on the conduct of a purely interstate business, so long as the tax is nondiscriminatory and is fairly apportioned to operations within the state. Thus, the constitutional issue presented by this appeal was entertained by and formed the basis of the decision of the Supreme Court of the State of Mississippi.

THE QUESTION IS SUBSTANTIAL

The issue presented to the Mississippi Supreme Court was the constitutional validity of a Mississippi statute which imposes a tax on the privilege of doing business within Mississippi, even though the activities of the taxpayer were solely and purely activities in interstate commerce. In upholding the statute, the opinion of the Supreme Court of Mississippi completely ignores (and does not even cite, much less attempt to distinguish) the leading decision of this Court on this issue, *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951).

Spector held that a state may not impose a privilege tax upon the business of carrying on interstate commerce. *Spector* held invalid a tax imposed expressly upon "the privilege of carrying on or doing business within the State . . .", 340 U. S. at 603 n. 1. Indeed, the statute declared invalid in *Spector* was almost identical to the Mississippi statute at issue in this case, which imposes the tax upon ". . . the privilege of engaging or continuing or doing business within this state. . . ."

Nor does the Mississippi Court's opinion make any reference to *Railway Express, Inc.* v. *Virginia*, 347 U. S. 359 (1954) (*Railway Express I*) in which the Court invalidated a license tax imposed expressly "for the privilege of doing business . . ." in the state. 347 U. S. at 361 n. 5. It was only after the Virginia statute was modified, so as to impose the tax on the taxpayer's property rather than on the privilege of doing business, that it was able to withstand constitutional attack. See *Railway Express, Inc.* v. *Virginia*, 358 U. S. 434 (1959) (*Railway Express II*).

The holdings of *Spector* and *Railway Express* are concisely summarized in *Colonial Pipeline* v. *Traigle*, 421 U. S. 100, 112 (1975), where this Court stated:

> *Spector* held invalid under the Commerce Clause a Connecticut tax based expressly "upon [the corporation's] franchise for the privilege of carrying on or doing business within the state . . . ." Similarly, *Railway Express I* invalidated Virginia's "annual license tax" imposed on express companies expressly "for the privilege of doing business" in the State. Thus both taxes, as express imposts upon the privilege of carrying on an exclusively

interstate business, contained the same fatal constitutional flaw . . . .

The Mississippi Court's decision made no reference whatsoever to the *Colonial Pipeline* decision.

It is abundantly clear that the Mississippi statute here involved also contains the "same fatal constitutional flaw" that was found in *Spector* and in *Railway Express I.* Furthermore, it was only by repealing and eliminating this "unconstitutional basis" for the tax that Louisiana was able to enact a taxing statute that would pass constitutional muster. The earlier Louisiana statute discussed in *Colonial Pipeline* had levied the tax "for the privilege of carrying on or doing business . . . in this State." 421 U. S. at 102. After the earlier statute was declared unconstitutional by a Louisiana court, the Louisiana Legislature amended the statute there involved by providing for three "alternative incidents" upon which the tax might be imposed, 421 U. S. at 103-04. It was the revised form of the statute that the Court upheld in *Colonial Pipeline.*

Despite the fact that the taxing statute involved in this case is virtually identical to the earlier unconstitutional Louisiana statute and the statutes held invalid in *Spector* and *Railway Express I,* the Mississippi Supreme Court has held in the present case that a privilege tax upon a purely interstate business is valid so long as it is not discriminatory and if there is no danger of interstate commerce being smothered by the cumulative taxes of several states. The Mississippi Supreme Court relied on the theory enunciated in the plurality opinion in *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662 (1949). *Interstate Oil Pipe Line,* however, predated *Spector,* and the *Spector* opinion clearly

limited the plurality opinion in *Interstate Oil Pipe Line* to its facts. See 340 U. S. at 609-610. Indeed, the theory adopted by the Mississippi Supreme Court in the present case is exactly the same theory advanced by the two Justices concurring separately in *Colonial Pipeline,* 421 U. S. at 115, which a majority of the Court declined to adopt.

As Mr. Justice Brennan noted in *Colonial Pipeline* the constitutional problem presented by this case is "a perennial one," 421 U. S. at 101. It is unusual, however, for a state appellate court to do as the Mississippi Supreme Court has done and to steer a course so clearly prohibited by the decisions of this Court. There is not even a semblance of an attempt to reconcile the Mississippi decisions with this Court's holdings; in this case it is not contended that the tax is levied upon the existence of any local incident, such as doing business in the corporate form. (Complete Auto had paid all franchise and income taxes imposed by the state.) Rather there is a naked assertion of the power to place a tax on the privilege of conducting a purely interstate business. Thus, we submit that there is no basis on which the Mississippi Court's decision can be reconciled with *Spector, Railway Express I,* or *Colonial Pipeline.*

This case is of major significance to all common and contract carriers transporting goods or passengers, as well as to other businesses of an interstate character. The rule adopted by the Supreme Court of Mississippi would allow the imposition of any privilege tax on interstate travel or commerce so long as the tax was nondiscriminatory and was applied only to the income fairly apportioned to activities conducted within the state. A failure to review and reverse the opinion of the Supreme Court of Mississippi will invite the Mississippi State

Tax Commission to assert similar taxes against other taxpayers in spite of the existing constitutional prohibitions against such taxes.

It is apparent that the decision of the Mississippi court, unless reversed, may well lead other states to attempt to impose other privilege taxes on Complete Auto. Since Complete Auto operates in 47 states other than Mississippi, the potential hardship created for this particular taxpayer is clear. In addition, there are numerous other carriers whose business closely approximates the business of Complete Auto, who would also be subject to such taxes.

Moreover, this case will not only have a substantial effect far beyond the hardships it will impose on Complete Auto and similar carriers, but it will also have a significant effect on the transportation industry generally. Each state with a sales or other privilege tax of general applicability could contend that every interstate carrier is (and has been) subject to such tax on that portion of its gross revenue which can be in some way apportioned to the state. The tax burden could be enormous, and its effect would be all the more overwhelming since it could be imposed retroactively to the extent permitted by the applicable statute of limitations. The imposition of such taxes could not have been anticipated, in view of the rule enunciated by this Court in *Spector* and *Colonial Pipeline*. Thus, the carriers have had no opportunity or occasion to pass the tax on to the consumer, usually the ultimate bearer of such a sales tax. Moreover, it should be noted that this is a tax on *gross* income—a tax that bears no relationship to net profits, and which, if not passed along to the consumer in one form or the other, might well in many instances exceed the net profit derived from the operations.

Thus, unless reversed, this decision will occasion great harm to Complete Auto and to other carriers. The impact of this decision will be greatly magnified since these companies have conducted their business in reliance on the constitutional rules enunciated in *Spector* and reiterated as recently as last year in *Colonial Pipeline*. A failure to entertain this cause on the merits will create tremendous uncertainty as to the constitutional power of states to place a privilege tax on interstate commerce, and will present carriers with the question whether they should collect such taxes from their customers as insurance against this type of assessment in the future. In essence, the uncertainty that will be occasioned if the case is not determined on its merits may well place a burden on interstate commerce substantially equivalent to the privilege tax itself. The importance and scope of this question requires that this Court entertain this case for a decision on the merits.

CONCLUSION

Probable jurisdiction should be noted and the decision of the Supreme Court of Mississippi summarily reversed.

Respectfully submitted,

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK, JR.
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

July, 1976

APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 48,590

COMPLETE AUTO TRANSIT, INC.

v.

CHARLES R. BRADY, JR., CHAIRMAN MISSISSIPPI STATE TAX COMMISSION

BEFORE GILLESPIE, ROBERTSON AND LEE

GILLESPIE, CHIEF JUSTICE, FOR THE COURT:

This case involves an assessment for sales taxes imposed upon Complete Auto Transit, Inc., a Michigan corporation (hereinafter Taxpayer). Taxpayer paid the taxes and filed suit in the Chancery Court of Hinds County to recover the sum paid. From a decree upholding the validity of the assessment, Taxpayer appealed to this Court.

Taxpayer is engaged in the business of hauling motor vehicles for General Motors Corporation. It is a certificated contract carrier operating throughout the United States pursuant to authority of the Interstate Commerce Commission. The Mississippi activity of Taxpayer requires the maintenance of a yard adjacent to a railroad at Jackson where an office, together with facilities for servicing Taxpayer's trucks, is maintained. Taxpayer receives approximately 350 automobiles per day from General Motors Corporation with whom it has a contract which is renegotiated from time to time in order to assure Taxpayer a fair return.

The General Motors plant in Georgia assembles automobiles for delivery to dealers in Mississippi and surrounding areas in other states. A sticker is placed on each automobile when it leaves the assembly plant in Georgia showing the dealer to whom it is to be sold. The vehicles are then loaded on railroad cars with a bill of lading showing the consignee as General Motors, in care of Complete Auto Transit. The bill of lading also shows the name of the city to which each automobile is to be delivered but not the name of the dealer to whom it is to be sold. The automobiles are transported to Jackson, Mississippi, by railroad and are unloaded onto Taxpayer's yard adjacent to the railroad. The bill of lading is then stamped "Received by General Motors Corporation, Chevrolet Motor Division, by Complete Auto Transit, Inc." The vehicles are then inspected for damage, and Taxpayer prepares waybills showing the shipper as General Motors Corporation, the description of the automobiles, and the names of the consignees (General Motors dealers in cities other than Jackson). As soon as practical, usually within twenty-four to forty-eight hours, the vehicles are loaded on Taxpayer's trucks and delivered to dealers at various points in and out of the State of Mississippi.

Taxpayer is paid on a contract basis, and ordinarily no bill is rendered by Taxpayer to General Motors Corporation. The entire transportation charge is collected by General Motors from the Dealer who ultimately receives the vehicle. The charges paid by General Motors to Taxpayer for transportation of vehicles from Jackson, Mississippi, to various General Motors dealers within the state are readily separable from charges for transporting vehicles from Jackson beyond the borders of Mississippi. Likewise, the transportation charges paid

the railroad company are in no way connected to the charges paid by General Motors to Taxpayer.

The question is whether the gross income derived by Taxpayer from transporting automobiles from Jackson to other points in the State of Mississippi is taxable by the State.

The statute levying the tax is Mississippi Code Annotated section 27-65-13 (1972), which provides:

> There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

The following sections, referred to in the statute, *supra*, describe the businesses taxed as "truck or any other transportation business for the transportation of property for compensation . . . between points within the state. . . ." The amount of the tax is five percent of the gross income.

The general rule is that a state may tax a local activity affecting or related to interstate commerce if the local activity is sufficiently separate from the out-of-state aspects of interstate commerce. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 92 L. Ed. 1832, 68 S.Ct. 1475 (1948). However, such a tax is invalid if there exists the danger that it can impose cumulative burdens on interstate commerce not borne by local commerce. General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964). The local activity taxed must be one that does not lend itself to

repeated exactions in other states. Memphis Natural Gas Co. v. Stone, *supra.*

The present case is controlled by cases arising in this State. Interstate Oil Pipe Line Co. v. Stone, 203 Miss. 715, 35 So.2d 73 (Miss. 1948), aff'd. 337 U.S. 662, 93 L.Ed. 1613, 69 S.Ct. 1264 (1949), involved the first leg of an interstate shipment. The tax was levied on the gross receipts from the operation of the oil pipelines wholly within the State. *Interstate* operated pipelines which were used to transport oil from various fields in Mississippi to loading racks adjacent to railroads elsewhere in the State. From the racks, the oil was pumped into railroad tank cars for shipment outside the State. If no tank cars were available, the oil was stored in tanks near the loading racks for short durations until cars were available. When the oil was delivered to *Interstate*, it was accompanied by shipping orders from the the producer or owner directing that the oil be transported to out-of-state destinations. There was no through bill of lading from the point of origin at the fields to the point of destination outside the State. *Interstate* was paid on a per barrel rate, specified in its tariff, for transporting the oil from the gathering point to the loading rack at the railroad. In upholding the validity of the tax, the Supreme Court of the United States said in a plurality opinion that it would not pause to consider whether the business of operating the pipeline was in interstate commerce, for the State had the power to impose the tax involved. The Court said that the tax was not invalidated by the commerce clause of the Federal Constitution merely because it imposed a direct tax on the privilege of engaging in interstate commerce. The Court concluded as follows:

> Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax. The judgment is affirmed. 337 U.S. at 668, 93 L.Ed. at 1620-21.

A case involving the final leg of an interstate shipment is *McKeigney* v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802 (1955), suggestion of error overruled, 81 So.2d 712 (1955), appeal dismissed *sub nom. Dunn Brothers, Inc.* v. *Stone*, 350 U.S. 878 (1955). In *Dunn* the tax was levied upon the activities of Dunn Brothers under the following state of facts. Tennessee Gas Transmission Company was engaged in constructing an interstate pipeline which crossed several states, including Mississippi. It purchased pipe for this purpose from California and had it delivered by common carriers to its right-of-way in Mississippi. To accomplish this, it had the railroad company deliver the pipe from the foundry in California to depots or rail heads in Mississippi as near to its right-of-way as was feasible. It engaged Dunn Brothers, a Texas corporation holding a certificate of public convenience and necessity for interstate commerce, to deliver the pipe by motor truck from the depots or rail heads in Mississippi to the rights-of-way of the transmission company. The transmission company, as consignor, shipped the pipe by railroad to itself as consignee to the various depots and rail heads

in Mississippi. Bills of lading were issued accordingly. The transmission company paid the freight, and when the shipments arrived at the rail destination, an agent of the transmission company inspected and accepted the pipe. Dunn Brothers then took charge of the shipment, and with the transmission company as both consignor and consignee, unloaded the car and delivered it to the right-of-way, for which service the transmission company paid Dunn Brothers. Based on *Interstate Oil Pipeline Co.* v. *Stone, supra,* and other decisions of the United States Supreme Court, this Court held that the tax was validly levied.

More recently, this Court upheld a tax on the gross income derived from the operation of a television cable system where a percentage of the signals rebroadcast by the taxpayer were received from outside the State. Rhoden v. Goodling Enterprises, Inc., 295 So.2d 433 (Miss. 1974).

In *Convoy Company* v. *Taylor,* 334 P.2d 772 (Wash. 1959), the Supreme Court of the State of Washington upheld a tax on an activity almost identical to that involved in the present case. In *Convoy,* the proof showed that Ford Motor Company, the shipper in that case, maintained control of the automobiles shipped so as to protect itself if the dealer became bankrupt or failed to pay for the units.

In the present case, General Motors maintains control of the vehicles, at least until they are shipped out by Taxpayer. The automobiles are consigned to General Motors at Jackson and are their property to do with as they see fit until they are ultimately transported by Taxpayer to the purchasing dealer.

It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case.

For the reasons stated, we hold that the tax was valid and the decree of the trial court is affirmed.

AFFIRMED.

PATTERSON, P.J., INZER, P.J., AND SMITH, ROBERTSON, SUGG, WALKER, BROOM AND LEE, JJ., CONCUR.

APPENDIX "B"

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

NO. 89,038

COMPLETE AUTO TRANSIT, INC.
COMPLAINANT
VS.
CHARLES R. BRADY, JR. CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION
DEFENDANT

OPINION OF THE COURT

(Filed August 5, 1974)

The facts in this case are not in dispute. The Court herewith uses the succinct statement of the Defendant as to the statement of facts. The Complainant, Complete Auto Transit, Inc., is a Michigan corporation licensed by the Mississippi Public Service Commission to haul motor vehicles in Mississippi. The Complainant is engaged in the business of hauling motor vehicles for General Motors Corporation. In the case at hand, General Motors Corporation shipped the vehicles via rail from various assembly plants located outside the State of Mississippi to a railroad ramp located in Jackson, Mississippi. At this point the vehicles are placed on a lot awaiting further shipment by the petitioner to various General Motors dealers in the state of Mississippi. The vehicles are shipped under a uniform straight bill of lading prepared by the manufacturer, General Motors Corporation, with General Motors Corporation as consignee, in care of Complete Auto Transit Corporation

at Jackson, Mississippi, for further shipment to the dealers. A separate bill of lading is prepared for the shipment of the vehicles by Complete from General Motors Corporation in Jackson, Mississippi, to the various dealers in the state. It is only the charges for hauling the cars under the bills of lading from General Motors, Jackson, Mississippi, to the various dealers within Mississippi that have been taxed.

The Complainant inspects the vehicles here in Jackson prior to accepting them in order to ascertain if they might have been damaged in transit. After the petitioner accepts the vehicles from General Motors at Jackson, Mississippi, as evidenced by a stamped receipt, they are loaded on the truck equipment and delivered to the various dealers located in Mississippi as shown on the original bill of lading. General Motors ships under two separate hauling contracts, one with the railroad and the other with complainant. General Motors pays both complainant and the railroads, under separate billings.

The State of Mississippi, pursuant to the authority of Sections 10105 and 10109(2) of the Mississippi Code of 1942, levied a sales tax on the gross receipts earned by the complainant from transporting the vehicles from the lot in Jackson, Mississippi, to the various General Motors dealers in the same state. No tax was assessed for transporting the cars from Jackson, Mississippi, to points outside the state. The State Tax Commission assessed the complainant for taxes in the amount of $167,375.03 for the period August 1, 1968, through July 31, 1972.

The Court is impressed with the fact that once the vehicle was delivered to the rail carrier, General Motors had absolutely nothing further to do with the

vehicle. Through rates were established in that both the rail carrier and the truck carrier had on file with the Interstate Commerce Commission the charges that would be made for the portion of the haul performed by each carrier, but joint rates were not in effect, that is, no rates were filed with the Interstate Commerce Commission which would permit General Motors to pay one carrier and have that carrier divide the charges with the other carrier. It was therefore necessary for General Motors to pay to the rail carrier the amount of its charges for the portion of the haul performed by the rail carrier and to pay to the truck carrier the charges for the portion of the haul performed by the truck carrier.

However, this Court feels that it is bound in this cause by the ruling of the Mississippi Supreme Court in *Rhoden* v. *Goodling Enterprises, Inc.*, a Mississippi case of June 4, 1974, 295 So. 2d, 433, which had to do with a cable television system serving the Meridian Naval Air Station in Lauderdale County, Mississippi. The estimate at the time of the trial was that ten to fifteen percent of the signals re-transmitted by the corporation to its subscribers within the State of Mississippi originated outside the State of Mississippi. In reversing the lower court (which had relied primarily on *Fisher's Blend Station, Inc.* v. *Tax Commission of State of Washington*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956 (1936)) which found that since part of the signals emanated from out-of-state broadcasting stations, the assessment affected interstate commerce and therefore was improper and uncollectible, the Court said:

> "We acknowledge the interstate character of CATV systems . . ., but nevertheless are of the

> opinion the tax in the present case was not unduly burdensome to interstate commerce and is not constitutionally prohibited.
>
> "The Fishers' Blend case held that a state occupation tax measured by the gross receipts . . . was an unconstitutional burden upon interstate commerce."

The Court went on to say of that decision:

> "The Court pointed out that the interstate commerce involved was not subject to the risk of repeated exactions of the same nature by other states, thus negating the likelihood of cumulative burdens of unconstitutional proportions."

The Court further went on to say that all of the income upon which the tax could be imposed is derived within this state. This is likewise true in the case at Bar, since the Commission did not impose a tax upon any deliveries by the Complainant to points outside the State of Mississippi.

Therefore, the prayer for relief must be denied and Complainant's bill of complaint must be dismissed with all costs being taxed to Complainant.

/s/ James Arden Barnett
Chancellor

APPENDIX "C"

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

NO. 89,038

COMPLETE AUTO TRANSIT, INC., COMPLAINANT

V.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION DEFENDANT

DECREE

(Filed August 6, 1974)

This cause having come on for hearing on the 12th day of June, 1974, before the Chancery Court of the First Judicial District of Hinds County, Mississippi, upon a petition filed by Complete Auto Transit, Inc., to declare an assessment of sales tax in the amount of $167,375.03 made by the Mississippi State Tax Commission for the period August 1, 1968, through July 31, 1972, invalid; and this Court, having heard and considered the arguments and evidence presented in the case and having issued a written opinion in the matter, a copy of which is attached hereto and made a part hereof, doth find:

That the prayer for relief asked for by the complainant, Complete Auto Transit, Inc., must be denied, and the bill of complaint must be dismissed with all costs being taxed to the complainant.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the prayer for relief asked for

by the complainant, Complete Auto Transit, Inc., must be denied, and the bill of complaint must be dismissed with all costs being taxed to the complainant.

The petitioner, Complete Auto Transit, Inc., having announced in open court its desire and intention to appeal from this decree and having petitioned in open court for such an appeal, the defendant being present in court at said time, said petition is granted and appeal allowed.

ORDERED AND ADJUDGED, this the 6th day of August, 1974.

Signed James Arden Barnett
Chancellor

Attorneys for Complainant:

Butler, Snow, O'Mara, Stevens & Cannada
Attorneys at Law
Post Office Box 22567
Jackson, Mississippi 39205

By: /s/ Robert C. Cannada

Attorneys for Defendant:

/s/ James H. Haddock

/s/ Joe D. Gallaspy

/s/ Wilson E. Hodge
Post Office Box 960
Jackson, Mississippi 39205

APPENDIX "D"

IN THE SUPREME COURT OF MISSISSIPPI

TUESDAY, APRIL 13, 1976, COURT SITTING

#48,590

COMPLETE AUTO TRANSIT, INC.

VS.

CHARLES R. BRADY, JR., CHAIRMAN
MISSISSIPPI STATE TAX
COMMISSION

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court, First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on the 6th day of August, 1974—be and the same is hereby affirmed. It is further ordered, adjudged and decreed that the appellant and Fidelity & Deposit Company of Maryland, sureties on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.

MINUTE BOOK "BR" PAGE 424

I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgment entered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office in the City of Jackson, Miss., this the 24th day of June A. D., 1976.

/s/ Julia H. Kendrick
Clerk Supreme Court

APPENDIX "E"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 48,590

COMPLETE AUTO TRANSIT, INC.
APPELLANT
V.
CHARLES R. BRADY, JR., CHAIRMAN
MISSISSIPPI STATE TAX
COMMISSION
APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed June 9, 1976)

Notice is hereby given that Complete Auto Transit, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Mississippi affirming the decree upholding the assessment of sales tax, entered in this action on April 13, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Robert C. Cannada
D. Carl Black, Jr.
Alan W. Perry
Rhesa H. Barksdale
By: /s/ Robert C. Cannada
Counsel for Appellant

Of Counsel:

Butler, Snow, O'Mara, Stevens & Cannada
Post Office Box 22567
1700 Deposit Guaranty Plaza
Jackson, Mississippi 39205

PROOF OF SERVICE

I, ROBERT C. CANNADA, one of the attorneys for appellant, Complete Auto Transit, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8 day of June, 1976, I served a copy of the foregoing Notice of Appeal on the parties required to be served by mailing a copy of same by United States mail, First-Class postage prepaid, to Mr. James H. Haddock, one of the attorneys for appellee, Charles R. Brady, Jr., Chairman Mississippi State Tax Commission, Post Office Box 1033, Jackson, Mississippi 39205.

/s/ Robert C. Cannada
Attorney for Complete Auto Transit, Inc.

APPENDIX "F"

Section 27-65-19, Miss. Code of 1972, Annotated (recodification of Section 10109, Mississippi Code of 1942)

§ 27-65-19. Public utilities.

(1) Upon every person selling to consumers, electricity, current, power, portable water, steam, coal, natural gas, liquefied petroleum gas or other fuel, there is thereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of the business. Provided, however, that there is hereby levied, assessed and shall be collected a tax equal to one per cent of the gross income of the business when the electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel, is sold to or used by a manufacturer, custom processor or public service company for industrial purposes which shall include that used to generate electricity, to operate an electrical distribution or transmission system, to operate pipeline compressor or pumping stations or to operate railroad locomotives.

The one per cent industrial rate provided herein shall also apply when the electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel is sold to a producer or processor for use directly in the production of poultry or poultry products, the processing of milk and milk products, the processing of poultry and livestock feed, and the irrigation of farm crops.

This one per cent rate shall not apply to sales of fuel for automobiles, trucks, truck-tractors, busses, farm tractors or airplanes.

Upon every person operating a telegraph or telephone business for the transmission of messages or conversation between points within this state, there is hereby levied, assessed and shall be collected, a tax equal to five per cent of the gross income of such business, with no deduction or allowance for any part of an intrastate rate charge because of routing across a state line.

(2) Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business, except persons operating local transit busses shall be exempt from such tax; and upon persons operating taxicabs within municipalities and within four miles thereof, there shall be collected a tax equal to two per cent of the gross income of the business.

"Gross income" shall mean and include the gross receipts derived from the operation of a taxi terminal or cab operating company to include the gross receipts or charges of each and all vehicles operating from or through said central terminal.

Supreme Court, U. S.
FILED
NOV 16 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT FILED JULY 12, 1976

PROBABLE JURISDICTION NOTED OCTOBER 4, 1976

INDEX

Chronological List of Important Dates Submitted in Lieu of Docket Entries 1

Bill of Complaint 2

Exhibit "A"—Letter of October 5, 1971, from State Tax Commission to Complete Auto Transit, Inc. .. 9

Exhibit "B"—Assessment of Sales Taxes 10

Exhibit "C"—Letter of December 28, 1972, from State Tax Commission to Complete Auto Transit, Inc. 11

Exhibit "D"—Assessment of Sales Taxes 12

Answer of Defendant to the Original Bill of Complaint 13

Order of Revivor 15

Reporter's Transcript 17

Appearances 17

Proceedings 17

Exhibits C-1(A) through C-1(H)—Documents used in connection with shipments of vehicles 20-28

Exhibit C-2—Copy of certificate of E. W. Robinson, Executive Secretary of Mississippi Public Service Commission 30

Testimony of Frank L. Sudduth 33

Testimony of John Flanagan 44

Exhibit C-3—Dealer copy of price label 54

Testimony of Walter Hansz 73

Exhibit C-4—Shipping document showing damage to vehicle 85

Exhibit C-5—Schedule showing taxes paid 92

Opinion of the Court 99

Decree 102

Notice to Court Reporter to Transcribe Notes and Appellant's Designation of Record 104

Judgment of the Supreme Court of Mississippi, Case No. 48,590 106

Notice of Appeal to the Supreme Court of the United States 113

CHRONOLOGICAL LIST OF IMPORTANT DATES SUBMITTED IN LIEU OF DOCKET ENTRIES

Chancery Court Proceedings

4/6/73	Bill of Complaint Filed
6/19/73	Answer Filed
6/12/74	Trial
8/5/74	Chancery Court Opinion Filed
8/6/74	Chancery Court Decree Filed, with Notice of Appeal
8/9/74	Notice to Court Reporter and Designation of Record
8/23/74	Appeal Bond Filed

Mississippi Supreme Court Proceedings

3/3/75	Appellant's Brief Filed
3/24/75	Appellee's Brief Filed
4/11/75	Appellant's Rebuttal Brief Filed
3/17/76	Appeal Argued and Case Submitted
4/13/76	Supreme Court Opinion Filed
4/13/76	Supreme Court Judgment Filed
6/9/76	Filed Notice of Appeal to Supreme Court of the United States

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTDICT OF HINDS COUNTY, MISSISSIPPI

No. 89,038

COMPLETE AUTO TRANSIT, INC.,
Complainant,

vs.

ARNY RHODEN, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Defendant.

BILL OF COMPLAINT

(Filed April 6, 1973)

Now comes Complete Auto Transit, Inc., and respectfully complaining, shows unto the Court the following:

1.

Complainant, Complete Auto Transit, Inc. (hereinafter referred to as "Complete"), is a corporation chartered under the laws of the State of Michigan. Complete is an established and authorized contract carrier engaged in the transportation of property for hire in interstate commerce, pursuant to permits issued to Complete by the Interstate Commerce Commission.

2.

The defendant, Arny Rhoden, is Chairman of the State Tax Commission of the State of Mississippi, and his official domicile is Jackson, Mississippi.

3.

As hereinafter shown more in detail, complainant has been improperly charged with certain sales taxes that the defendant claims were imposed on complainant's transportation business by the laws of the State of Mississippi. Complainant has been required to pay said taxes, and complainant is entitled to recover the amount so paid together with interest thereon, in this action against the defendant. The Chancery Court of Hinds County is vested with original jurisdiction of this action to recover the taxes improperly collected from complainant by the defendant. The period of time involved in this case is from August 1, 1968 through July 31, 1972.

4.

During the period of time here involved, and at the present time, Section 2 of Chapter 109 of the General Laws of Mississippi, Extraordinary Session of 1955, which was an amendment to the "General Sales Tax Law" of the State of Mississippi, contained, and now contains, the following provision:

> "Section 2. Tax Levied. There is hereby levied and assessed and shall be collected privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections." (Section 10105, Mississippi Code of 1942, as amended)

Likewise, during the period of time here involved, Section 2-d of said Chapter 109 described certain "Public Utilities" upon which the privilege (sales) tax levied by the aforesaid Section 2 was imposed. During the period of time here involved, said Section 2-d appeared as Section 10109, Mississippi Code of 1942, as amended. Among other things, said Section 2-d imposed a privilege (sales) tax upon "every person operating a pipeline, railroad, airplane, bus, truck, *or any other transportation business for the*

transportation of persons or property for compensation or hire between points within this state."

As previously stated, the period of time involved in this case is from August 1, 1968, through July 31, 1972. Throughout this period, the rate of tax imposed by said section was 5% of the gross income of the transportation businesses described in said section.

Effective from and after August 1, 1972, by Section 2 of Chapter 506, Mississippi Laws of 1972, said Section 2-d was amended so as to eliminate the tax on transportation businesses engaged in the transportation of property for compensation or hire between points within this state.

5.

Heretofore, the defendant has taken the position, and the defendant now contends that during the period from August 1, 1968 to and including July 31, 1972, while the aforesaid privilege tax on the transportation of property between points in Mississippi was in effect, the complainant was engaged in the transportation of property within the meaning of said tax statutes, and complainant was subject to the tax imposed thereby. On the other hand, complainant has taken the position and now contends that all of complainant's operations that defendant contends were subject to said tax were operations in interstate commerce, and that such operations were not and are not subject to the privilege tax imposed by the aforesaid statutes. The respective positions of the complainant and of the defendant are based upon the operations of the complainant that are hereinafter described.

6.

(a) The complainant, Complete, is engaged in the transportation of motor vehicles in interstate commerce

as hereinafter described. Complete owns certain tractors and trailers that are utilized in the transportation of such motor vehicles. Complete does not own any real property in the State of Mississippi. Complete has paid all Mississippi State, county, and municipal ad valorem taxes that have been assessed on the property owned by it in Mississippi. Likewise, Complete has duly filed returns and has paid all Mississippi State income taxes and corporate franchise taxes due by it, as such taxes have become due and payable.

(b) Complete is engaged in the business of moving automobiles and other motor vehicles that are shipped by the General Motors Corporation from points outside of Mississippi to points in Mississippi and surrounding states. Typically, each such shipment by the General Motors Corporation includes several individual motor vehicles, and the initial movement of each such shipment is by railroad. Such shipments originate at various assembly plants operated by the General Motors Corporation, and the individual vehicles constituting such shipment are consigned to various General Motors dealers at various destinations in Mississippi and surrounding states. At the time a shipment originates, the ultimate destination of each of the motor vehicles is known, and such destination is shown on the face of the original bill of lading issued by the originating rail carrier. Likewise, the ultimate destination of each vehicle and the name of the particular General Motors dealer to whom each vehicle is consigned are shown on a window sticker attached to each vehicle. The shipments are transported by the railroads under waybills that show the point of origin of each motor vehicle loaded on the railroad cars, together with the identifying number of each motor vehicle and the ultimate destination of each such vehicle at various points in Mississippi and other states.

(c) When a railroad car carrying motor vehicles shipped by General Motors Corporation arrives at Jackson, Mississippi, the cars are unloaded by representatives of the railroad and the vehicles are placed on a lot for reloading by Complete onto trailers, pursuant to shipping instructions previously issued by General Motors Corporation. The motor vehicles are promptly loaded onto trailers by representatives of Complete. and Complete performs that portion of the interstate journey that involves movement of the motor vehicles from a truckaway lot located on the railroad yards in Jackson, Mississippi, to the ultimate destinations of the individual vehicles in Mississippi and surrounding states. That is to say, Complete completes the interstate transportation of the motor vehicles and delivers them to the ultimate consignees (General Motors dealers) at the ultimate points of destination.

(d) The interstate movement of the vehicles is not completed at Jackson, Mississippi, and the vehicles are not accepted at Jackson, Mississippi, either by the shipper or by the particular General Motors dealers who are the consignees of the individual vehicles.

(e) In short, the transportation operation performed by Complete constitutes one leg of an interstate movement of motor vehicles, which is conducted by two or more authorized carriers holding certificates of public convenience and necessity or permits issued by the Interstate Commerce Commission.

7.

In view of the foregoing, complainant avers that its operations that defendant seeks to subject to the Mississippi sales tax are operations that are exclusively and solely in interstate commerce, and such operations are not subject to the privilege tax imposed by the Mississippi

Sales Tax Law. Notwithstanding this fact, the defendant has notified complainant that complainant has been assessed for sales taxes for the period August 1, 1968 through July 31, 1972, based on the aforesaid operations and activities of complainant. By letter dated October 5, 1971, complainant was notified that it had been assessed "for additional sales tax and interest of $122,160.59 for the period August 1, 1968 to July 31, 1971." Annexed to said letter was an "Assessment of Sales Taxes" made by the defendant. True copies of said letter and Assessment are annexed hereto as Exhibits "A" and "B", respectively. Subsequently, representatives of complainant have appealed defendant's assessment to the Board of Review and to the State Tax Commission, as provided by law, and complainant has explained its operations and its position that it is not liable for said taxes. Nevertheless, the defendant has rejected the protests of complainant and has ruled that the complainant is liable for the taxes assessed. Subsequently, by letter dated December 28, 1972, complainant was notified that it had been assessed for "additional sales tax and interest in the amount of $42,990.89 for the period August 1, 1971 through July 31, 1972." Annexed to said letter of December 28, 1972 was an "Assessment of Sales Taxes" by the defendant. True copies of said letter and Assessment are annexed hereto as Exhibits "C" and "D", respectively. By checks dated July 13, 1972 and February 1, 1973, complainant paid to the Mississippi State Tax Commission the sum of $167,-375.38 covering said assessments in full. At the time of such payments, complainant advised representatives of the defendant that these payments were being made under protest and that complainant intended to institute suit for the receovery of such taxes.

8.

For the foregoing reasons, complainant avers that it has been improperly charged with and required to pay the aforesaid sales taxes and interest in the amount of $167,375.38. In accordance with Section 10121.1, Mississippi Code of 1942, complainant is entitled to recover said amount, together with interest, in this action against the defendant Commissioner. Complainant avers that it alone bore the burden of the tax sued for, and it did not, directly or indirectly, collect the tax from its customers, and that complainant is entitled, in justice and good conscience, to the relief sought in this suit. Complainant further avers that it is the real party in interest and that this suit is filed within the time permitted by law.

WHEREFORE, PREMISES CONSIDERED, complainant prays that process may be issued to defendant, requiring him to answer this bill of complaint, but not to answer under oath, as answer under oath is hereby waived. Complainant further prays that upon a final hearing of this cause, complainant recover from the defendant the sum of $167,375.30, together with lawful interest, to be paid in accordance with law. Complainant further prays for general relief.

Complete Auto Transit, Inc.

By: /s/ Walter W. Hansz

(Affidavit omitted in printing)

Exhibit "A"

STATE TAX COMMISSION

(Seal)

Arny Rhoden, Chairman

JACKSON, MISSISSIPPI 39205

Jimmie Walker, Excise Commissioner

Robert A. Biggs, Jr., Ad Valorem Commissioner

October 5, 1971

CERTIFIED MAIL 25-New

Complete Auto Transit, Inc.
5550 Bircher Boulevard
St. Louis, Missouri 63120

Gentlemen:

We have received a report from our Auditor, Mr. Sudduth and Mr. Emerson, which indicates that you owe additional sales tax and interest of $122,160.59 for the period August 1, 1968 to July 31, 1971.

The Commissioner's assessment is enclosed. You are requested to send remittance for the above amount within ten days or show cause why this assessment should not become final. Please give this matter your immediate attention.

Very truly yours,

/s/ H. I. Adcock
H. I. Adcock, Chief
Special Audit Division

/wp
Enclosure

(RECEIVED
Oct 6 - 1971
C.A.T.
St. Louis, Mo.)

Exhibit "B"

[illegible]

[illegible] Jackson, Mississippi

ASSESSMENT OF SALES TAXES

To Complete Auto Transit, Inc., Taxpayer

5550 Bircher Boulevard

of St. Louis, Missouri Greetings:

Acting in accordance with Section 10119, Mississippi Code of 1942, as amended by Chapter 106, Laws of 1955, and pursuant to an audit or other information relating to your records or returns, which discloses that sales taxes are due and unpaid, I the undersigned Commissioner, hereby make the following assessment against you:

Period: August 1 1963 to July 31 1971, inclusive

Corrected Tax Liability	$
Original Tax Paid	111,196.32
Deficiency or Additional Tax Due	10,833.27
Interest	
Damages	
Total Assessment	$ 122,160.59
Part Payment on Assessment	-0-
Balance of Assessment Due	$ 122,160.59

If a check is given in part or full payment of the total assessment and said check is not paid by the bank, then the original assessment remains in full force, and this is notice that the original assessment is due and owing and demand is made therefor.

Pursuant to the further provisions of the statute, payment is demanded within ten days of this date, and if not paid within that time, a Notice of Tax Lien may be filed with the Circuit Clerk of [illegible] County for enrollment as a judgment upon which a warrant or an execution may be issued at any time.

This, the 5 day of October, 1971.

/wp

[illegible]
COMMISSIONER

BEST COPY AVAILABLE

Exhibit "C"

STATE TAX COMMISSION

(Seal)

Arny Rhoden, Chairman

JACKSON, MISSISSIPPI 39205

Robert L. Vaughan, Sr. — Excise Commissioner

Robert A. Biggs, Jr. — Ad Valorem Commissioner

December 28, 1972

CERTIFIED MAIL

Complete Auto Transit, Inc.
5550 Bircher Blvd.
St. Louis, MO 63120

Gentlemen:

We have received a report from our auditor, Mr. Patterson and Mr. Jennings, which indicates that you owe additional sales tax and interest in the amount of $42,990.89 for the period August 1, 1971 to July 31, 1972.

The Commissioner's assessment is enclosed. Pursuant to Section 10121 of the Sales and Use Tax Law, you are requested to forward remittance for the tax assessed or apply in writing for a hearing and correction of the assessment within ten days from this date.

Very truly yours,

/s/ H. I. Adcock
H. I. Adcock, Chairman
Board of Review

HIA:ws
Enclosure

(RECEIVED
Jan 2 - 1973
C.A.T.
St. Louis, Mo.)

Exhibit "D"

State Tax Commission

State of Mississippi

County of Hinds

Account No. _____

Jackson, Mississippi

ASSESSMENT OF SALES TAXES

To Complete Auto Transit, Inc., Taxpayer

5550 Bircher Blvd.

of Stl Louis, Missouri Oklahoma/Mississippi, Greetings:

Acting in accordance with Section 10119, Mississippi Code of 1942, as amended by Chapter 106, Laws of 1955, and pursuant to an audit or other information relating to your records or returns, which discloses that sales taxes are due and unpaid, I the undersigned Commissioner, hereby make the following assessment against you:

Period: August 1 19 71 to July 31 19 72, inclusive

Corrected Tax Liability	$ _____
Original Tax Paid	_____
Deficiency or Additional Tax Due	41,052.57
Interest	1,938.32
Damages	_____
Total Assessment	$ 42,990.89
Part Payment on Assessment	-0-
Balance of Assessment Due	$ 42,990.89

If a check is given in part or full payment of the total assessment and said check is not paid by the bank, then the original assessment remains in full force, and this is notice that the original assessment is due and owing and demand is made therefor.

Pursuant to the further provisions of the statute, payment is demanded within ten days of this date, and if not paid within that time, a Notice of Tax Lien may be filed with the Circuit Clerk of your county for enrollment as a judgment upon which a warrant or an execution may be issued at any time.

This, the 28 day of December, 19 72

/ws

Arny Rhoden
COMMISSIONER

FORM 81100

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT, HINDS COUNTY, MISSISSIPPI

(Title omitted in printing)

ANSWER OF DEFENDANT TO THE ORIGINAL BILL OF COMPLAINT

(Filed June 19, 1973)

COMES NOW the defendant, Arny Rhoden, Chairman, Mississippi State Tax Commission of the State of Mississippi, hereinafter referred to as "defendant," and for answer herein would respectfully show unto the Court:

1.

Defendant has no knowledge nor means of knowledge of the allegations of fact contained in Paragraph 1 of the original Bill of Complaint, and therefore denies same.

2.

Defendant admits the allegations of fact contained in Paragraph 2 of the original Bill of Complaint.

3.

In answer to the allegations of fact contained in Paragraph 3 of the original Bill of Complaint, the defendant denies that complainant has been improperly charged with certain sales taxes that the defendant imposed on complainant's transportation business by the laws of the State of Mississippi. Defendant admits that complainant was required to pay said taxes and defendant denies that complainant is entitled to recover the amount so paid, together with interest thereon, in this action against the defendant. Defendant admits that the Chancery Court of Hinds County is vested with original jurisdiction of this action to seek recovery of the taxes alleged to have been improperly col-

lected from complainant by the defendant. The defendant admits that the period of time involved in this case is from August 1, 1968, through July 31, 1972.

4.

Defendant admits the allegations contained in Paragraph 4 of the original Bill of Complaint.

5.

Defendant admits the allegations contained in Paragraph 5 of the original Bill of Complaint except that the defendant has no knowledge nor means of knowledge of the operations of the complainant that were thereafter described in the original Bill of Complaint, and therefore denies same.

6.

Defendant has no knowledge nor means of knowledge of the allegations of fact contained in Paragraph 6 (a), (b), (c), (d), and (e) of the original Bill of Complaint, and therefore denies same.

7.

Defendant admits the allegations contained in Paragraph 7 of the original Bill of Complaint except that defendant denies that the operations of complainant that defendant subjected to the Mississippi sales tax are operations that are exclusively and solely in interstate commerce and denies that such operations are not subject to the privilege tax imposed by the Mississippi Sales Tax Law.

8.

Defendant denies the allegations contained in Paragraph 8 of the original Bill of Complaint except that defendant admits complainant paid sales taxes and interest

in the amount of $167,375.38 and that the suit is filed within the time permitted by law.

AND NOW, HAVING FULLY ANSWERED, defendant denies that the complainant is entitled to recover from the defendant the sum of $167,375.30, together with lawful interest, or any sum whatsoever, and defendant prays that the original Bill of Complaint herein be dismissed at the costs of complainant.

Respectfully submitted,

/s/ Taylor Carlisle
Taylor Carlisle
Attorney for Defendant
Post Office Box 960
Jackson, Mississippi 39205

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT, HINDS COUNTY, MISSISSIPPI

(Title omitted in printing)

ORDER OF REVIVOR

(Filed May 6, 1974)

THIS case having come on for hearing on motion ore tenus of complaint, Complete Auto Transit, Inc., for revival of this cause in the name of Charles R. Brady, Jr., insofar as the interest of the defendant is concerned, and the Court having considered said motion and being fully advised in the premises is of the opinion, and so finds, that Arny Rhoden, Chairman, Mississippi State Tax Commission, was the original defendant in this cause, and that after the filing of suit but before a trial of this cause had commenced, the said Arny Rhoden ceased oc-

cupying the position of Chairman, Mississippi State Tax Commission. The court further finds that no final judgment has been entered in this cause as of this date. The court further finds that Charles R. Brady, Jr., is the duly qualified and present Chairman of the Mississippi State Tax Commission. The motion has been presented within the time and in the manner prescribed by law so that the movants are entitled to the relief therein sought by virtue of the provisions of Section 11-7-31, Mississippi Code of 1972, Annotated.

IT IS, THEREFORE, ORDERED AND ADJUDGED that this cause be, and it is hereby, revived insofar as the interest of the defendant, Chairman, Mississippi State Tax Commission is concerned in the name of Charles R. Brady, Jr., Chairman, Mississippi State Tax Commission.

IT IS FURTHER ORDERED AND ADJUDGED that this cause may now proceed as "Complete Auto Transit, Inc., v. Charles R. Brady, Jr., Chairman, Mississippi State Tax Commission" bearing No. 89,038 on the docket of this court.

SO ORDERED AND ADJUDGED this the 6th day of May, 1974.

/s/ James Arden Barnett
Chancellor

Agreed to and Approved:

/s/ Robert C. Cannada
Of Counsel for Complainant

/s/ James H. Haddock
Of Counsel for Defendant

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title omitted in printing)

REPORTER'S TRANSCRIPT

(Filed October 18, 1974)

APPEARANCES:

Honorable George H. Butler and *Honorable Robert C. Cannada* of the firm Butler, Snow, O'Mara, Stevens & Cannada, P.O. Box 22567, Jackson, Mississippi, 39205, present and representing Complainant.

Honorable James H. Haddock, Honorable Joe D. Gallaspy and *Honorable Wilson E. Hodge,* Mississippi State Tax Commission, Post Office Box 960, Jackson, Mississippi, present and representing Defendant.

BE IT REMEMBERED that on June 12, 1974, one of the days of the regular June 1974 Term of the Chancery Court aforesaid, the above entitled matter came on for hearing at 9:00 A.M. in Hinds County Chancery Courtroom No. 4, in the Chancery Court Building at Jackson, Mississippi before Honorable James Arden Barnett, Chancellor of the Fifth Chancery Court District of the State of Mississippi, sole presiding, when and where the following proceedings were had and entered of record, to-wit:

By the Court: Mr. Cannada, are you all ready for the Complainant?

[2] By Mr. Cannada: We are ready, Your Honor.

By the Court: Mr. Haddock, are you all ready?

By Mr. Haddock: Yes, Your Honor, we are ready.

By the Court: Would you like to make an opening statement?

By Mr. Cannada: Has the Court read the file?

By the Court: Yes.

By Mr. Cannada: If you think an opening statement will be of assistance, we will make it but since you have read the file and you are thoroughly familiar with it, I don't know that an opening statement would be of any advantage.

By Mr. Haddock: We might just state the issues, if you would like to narrow the thing down. It is up to Mr. Cannada to . . .

By the Court: Any narrowing down of the issues will be appreciated by the Court.

By Mr. Cannada: No, sir. I don't know of any, if the Court please. I don't care about an opening statement.

By Mr. Haddock: Neither do I, except that I thought maybe it [3] would be of assistance to the Court.

By Mr. Cannada: I think we narrowed it in the pleadings.

By the Court: Let's proceed, then. Do you desire that the rule be invoked?

By Mr. Cannada: We don't care for it.

By the Court: All right. Who do you have?

By Mr. Cannada: Before we call a witness, if the Court please, we have by agreement some exhibits that we would like to put in by agreement and stipulation as general exhibits. First, we have a series of documents that I would like to have marked as Exhibit 1-A. B, C, D, etc. Otherwise, it may be a little confusing as they all deal with the same thing. If the Court please, we offer in evidence the documents that have been marked C-1-A through C-1-H which is put in evidence by agreement between the parties as the documentation which is illustrative of the type of documents that were used by the parties in connection with the transportation of these vehicles during the period of time involved in this

litigation. It is understood that witnesses may indicate that some variations of these forms were used from time to time from plant to plant, but that this series of documents is illustrative of the basic documentation used in connection with the shipment of these vehicles. Mr. Haddock, is that stating it as you and I [4] agreed?

By Mr. Haddock: Yes, sir.

By the Court: Let them be marked and entered.

(The documents introduced by stipulation were marked as Exhibit C-1-A through C-1-H and are as follows:)

Exhibit C-1(A)

724—SOUTHERN RAILWAY SYSTEM—724

SOUTHERN — AGS RR — AASC RY — CANW RY — CL RR
CHOATP RY — GSAF RY — SO GA RY — INT RR
LOP&G RR — LA SOU RY — SU RR

THIS MEMORANDUM [illegible] 407-C-3 PARTS

SHIPPER'S NUMBER

STOP THIS CAR	AT	FOR	LENGTH OF CAR ORDERED	LENGTH OF CAR FURNISHED	MISC. PRO. NO.

CAR INITIALS AND NUMBER	TRAILER INITIALS AND NUMBER	CHASSIS INITIALS & NUMBER	PLAN	WAYBILL DATE	WAYBILL NUMBER
BTYI 550930				2/2/71 R 6396 082	70078
CAR TRANSFERRED TO	TRAILER INITIALS AND NUMBER	CHASSIS INITIALS & NUMBER	PLAN	TIME	BY:

TO STATION: JACKSON, MISS. — STATE

FROM NO. AT (6408) ROSELAND, GA. — STATE
NO. (B/A 6396) ATLANTA, GA.

ROUTE: SRS - MERIDIAN, MS

ROUTING SHOW "A" IF AGENT'S SHOW "S" IF SHIPPER'S: RWC 372

FULL NAME OF SHIPPER AND ADDRESS:
G. M. ASSEMBLY DIVISION
GENERAL MOTORS CORPN.
LAKEWOOD PLANT, ATLANTA, GA. 30303

CUSTOMER CODE NO: 474

RECONSIGNED TO — STATE

PER: R. J. JONES, T. M

Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement. The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

☐ YES — SIGNATURE OF CONSIGNOR

NOTE: Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper not to exceed [illegible] PER

AUTHORITY

CONSIGNEE AND ADDRESS:
G. M. ASSEMBLY DIVISION
GENERAL MOTORS CORPORATION

CUSTOMER CODE NO: [illegible]

IN CARE OF: COMPLETE AUTO TRANSIT

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE "TO BE PREPAID" — TO BE PREPAID

DATE REV. W/B PREP.

COMMODITY CODE NUMBER: 37-111-20

FOR THE CARRIER: B. L. WILLIAMS, AGENT PER

NO. PKGS.	DESCRIPTION OF ARTICLES SPECIAL MARKS AND EXCEPTIONS	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
10	MOTOR VEHICLES, PASS., OR FREIGHT COMP., SET UP WITH TOOL KITS			[illegible]		[illegible]

CONSIGNEE	SERIAL NO.	SHIPPER'S NO.
[illegible]	ASK 45.90	
LITTLE ROCK	• 52.50	
POCAHONTAS	• 63.00	
MERIDIAN MISS	• 78.75	602583
BROOKS	• 48.15	
[illegible]	• 54.25	
JACKSONVILLE	• 53.15	602581
GALLATIN CITY →	MISS 53.25	602576
BELZONI	• 21.00	
SILVERTON	[illegible]	

546.85

DESIG. AGENT'S F/B NO.

SHIPPER'S WEIGHT/LOAD AND COUNT

EXHIBIT C-1-A
WITNESS
JUN 12 1974
MARY BURKETT Reporter

Exhibit C-1(B)

724—SOUTHERN RAILWAY SYSTEM—724

SOU RY — AGS RR — AASC RY — CANW RY — CL RR
CHOATP RY — GSAF RY — SO GA RY — INT RR
LOP&G RR — LA SOU RY — SU RR

THIS MEMORANDUM [illegible] 407-C-3 PARTS

SHIPPER'S NUMBER

STOP TO IS	AT	FOR	LENGTH OF CAR ORDERED	LENGTH OF CAR FURNISHED	MISC. PRO. NO.

CAR INITIALS AND NUMBER	TRAILER INITIALS AND NUMBER	CHASSIS INITIALS & NUMBER	PLAN	WAYBILL DATE	WAYBILL NUMBER
BTYI 550930				2-2-71 J 6396 082	70087
CAR TRANSFERRED TO	TRAILER INITIALS AND NUMBER	CHASSIS INITIALS & NUMBER	PLAN	TIME:	BY:

STATION: [illegible], Miss. — STATE

FROM NO. AT (6408) ROSELAND, GA. — STATE
NO. (B/A 6396) ATLANTA, GA.

ROUTE: SRS - Meridian, MS

ROUTING SHOW "A" IF AGENT'S SHOW "S" IF SHIPPER'S:

FULL NAME OF SHIPPER AND ADDRESS:
G. M. ASSEMBLY DIVISION
GENERAL MOTORS CORPN.
LAKEWOOD PLANT, ATLANTA, GA. 30303

CUSTOMER CODE NO: 474

RECONSIGNED TO — STATE

PER: R. J. JONES, T. M

Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement. The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

☐ YES — SIGNATURE OF CONSIGNOR

NOTE: Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper not to exceed [illegible] PER

AUTHORITY

CONSIGNEE AND ADDRESS:
G. M. ASSEMBLY DIVISION
GENERAL MOTORS CORPORATION

CUSTOMER CODE NO: [illegible]

IN CARE OF: Complete Auto Transit, Inc.

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE "TO BE PREPAID" — TO BE PREPAID

DATE REV. W/B PREP.

COMMODITY CODE NUMBER: 37-111-20

FOR THE CARRIER: B. L. WILLIAMS, AGENT PER

NO. PKGS.	DESCRIPTION OF ARTICLES SPECIAL MARKS AND EXCEPTIONS	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
10	MOTOR VEHICLES, PASS., OR FREIGHT COMP., SET UP WITH TOOL KITS			[illegible]		[illegible]

CONSIGNEE	SERIAL NO.	SHIPPER'S NO.
Yale Pontiac	In. 23.65	
Haddon	Miss. 23.65	
Roseville	• 28.00	
Ypsilanti	Ark. 50.75 •	
Orrville	• 54.25 •	
Baker Springs	• 65.65 •	
Nicholas Twp.	• 71.75 •	
Port Angeles	• 46.40 •	
Quincy	• 57.65 •	
Greenville	• 35.00	

457.75

DESIG. AGENT'S F/B NO.

SHIPPER'S WEIGHT/LOAD, AND COUNT

EXHIBIT C-1-B
WITNESS
JUN 12 1974
MARY BURKETT Reporter

BEST COPY AVAILABLE

Exhibit C-1(C)

724—SOUTHERN RAILWAY SYSTEM—724

SOU RY – AGS RR – A&BC RY – CANW RY – CL RR
CNOGTP RY – GS&F RY – SO GA RY – INT RR
LOP&G RR – LA SOU RY – SU RR

THIS MEMORANDUM is an independent object, not a part of bill of lading but issued only to aid the (original) Bill of Lading and a copy or duplicate thereof, the property named herein, said to be transported under the (this) or (said) (seventy days) contract to the (original) Bill of Lading

407-C-3 PARTS

SHIPPERS NUMBER

STOP THIS CAR | AT | FOR | LENGTH OF CAR ORDERED | LENGTH OF CAR FURNISHED | MISC. PRO. NO.

CAR INITIALS AND NUMBER: SP-523595 | TRAILER INITIALS AND NUMBER | CHASSIS INITIALS & NUMBER | PLAN | WAYBILL DATE: 6-11 6396 188 TIME: | WAYBILL NUMBER: 70098 | BY:

CAR TRANSFERRED TO | TRAILER INITIALS AND NUMBER | CHASSIS INITIALS & NUMBER | PLAN

TO STATION: Jackson, Miss. | STATE | ROUTE: SRS - Meridian IC

FROM NO. | STATION: AT (6408) ROSELAND, GA. | STATE

NO.: (B/A 6396) ATLANTA, GA.

ROUTING SHOW "A" IF AGENT'S SHOW "S" IF SHIPPER'S: RWC 372

FULL NAME OF SHIPPER AND ADDRESS: G. M. ASSEMBLY DIVISION GENERAL MOTORS CORPN. LAKEWOOD PLANT, ATLANTA, GA. 30303 | CUSTOMER CODE NO.: 474

R. J. JONES, T. M. PER

RECONSIGNED TO | STATION | STATE

AUTHORITY

CONSIGNEE AND ADDRESS: G. M. ASSEMBLY DIVISION GENERAL MOTORS CORPORATION | CUSTOMER CODE NO.: 38-57

IN CARE OF Complete Auto Transit, Inc.

Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

☐ YES SIGNATURE OF CONSIGNOR

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper not to exceed PER

IF CHARGES ARE TO BE PRE-PAID, WRITE OR STAMP HERE "TO BE PREPAID" TO BE PREPAID

FOR THE CARRIER B. L. WILLIAMS, AGENT PER

DATE REV. W/B PREP | COMMODITY CODE NUMBER: 37-111-20

NO. PKGS.	DESCRIPTION OF ARTICLES SPECIAL MARKS AND EXCEPTIONS	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
10	MOTOR VEHICLES, PASS., OR FREIGHT COMP., SET UP WITH TOOL KITS			[illegible]		[illegible]

CONSIGNEE	SERIAL NO.	SHIPPERS NO.	
Charleston	No. 72.65	CRMALA-610886	
Memphis	Miss. 40.25	"	606636
Detroit	" 21.00	"	606622
E. Lansing Rack	Ark. 52.50	"	606626
Edison	" 40.25	"	606635
Kirkwood	" 34.15	CRMALA-610904	
Conroy	" 59.50	"	606908
	" 59.50	"	606920
Greenville	" 54.25	"	606938
Lansing Rack	" 52.50	CRMALA-606939	
	486.55		

EXHIBIT C-1-C
WITNESS
JUN 12 1974
MARY BURKETT Reporter

DESTN. AGENT'S I/S NO.

SHIPPER'S WEIGHT/LOAD, AND COUNT

6

BEST COPY AVAILABLE

Exhibit C-1(D)

02/01/710

EXHIBIT C-1-D
WITNESS
JUN 12 1974
MARY BURKETT Reporter

BTTX 550628
70078
2/11/71

PLANT

TRUCK

RECEIVED

(This stamp appears on the back side of Exhibit C-1(D).)

RECEIVED
GENERAL MOTORS CORP.
CHEVROLET MOTOR DIVISION
FEB 6 1971
COMPLETE AUTO TRANSIT, INC.
By

Exhibit C-1(E)

COMPLETE AUTO TRANSIT, INC.

POINT OF ORIGIN DESTINATION

BAY NO. B25
LOCATION CODE AND WAYBILL NO. 11 409852

SHIPPER: GENERAL MOTORS CORPORATION

RECEIVED BY COMPLETE AUTO TRANSIT, INC. AT

ATLANTA	CINCINNATI	DORAVILLE	FLINT	ST. LOUIS	WILLOW RUN
DALLAS	JACKSON XX	JACKSONVILLE	MIAMI	SHREVEPORT	TAMPA

CONSIGNED TO
HAWKINS CHEV INC
CALHOUN CITY MISS
17294

DATE RECEIVED AT TERMINAL
2 3
AM PM

EXHIBIT C-1-E

DATE DISPATCHED
AM PM

DRIVER TRACTOR NO. TRAILER NO.

WITNESS

JUN 12 1974

MARY BURKETT Reporter

SERIAL NO.	IDENT. NO.	MILEAGE
CE141 CE10934 Z18	A606576	FEB 26 45
BC		
PRODUCING PLANT	SHIPPING DATE	RAILROAD CAR NO.
ATL	2 1 71	550928

MAGE ADVANCE

153
146
299
828
420
925
573

ROUTE
57-8-9-330-32-7-30-15-

THE UNDERSIGNED HEREBY CERTIFIES THAT THE ABOVE CARS HAVE BEEN THOROUGHLY INSPECTED AND FOUND IN GOOD CONDITION AND CONTAINED ALL TOOLS, MATS, ACCESSORIES AND OTHER EQUIPMENT UNLESS OTHERWISE NOTED BELOW AND

THAT THE ABOVE DESCRIBED SHIPMENT HAS BEEN CHECKED BY ME IN ALL MATTERS PERTAINING TO THE EQUIPMENT INSPECTION AND USE OF EMERGENCY INSPECTION AND USE OF EMERGENCY EQUIPMENT ON ALL POWER UNITS ALSO THAT THE TIME SPENT INSPECTING TRACTOR TRAILER EQUIPMENT HAS BEEN NOTED AND IS IN COMPLIANCE WITH 49 C.F.R. ANY COMPANY RULES OR REGULATIONS WITH REFERENCE TO PREPARATION OF TRIP, LOADING, EQUIPMENT ETC. HAVE BEEN COMPLIED WITH AND ADD MY SIGNATURE CERTIFYING SAME

DRIVER'S SIGNATURE DATE TIME AM PM

TERMINAL OR BRANCH COPY INSPECTOR'S SIGNATURE

REV. 5/67

Exhibit C-1(F)

COMPLETE AUTO TRANSIT, INC.

POINT OF ORIGIN DESTINATION

SHIPPER: GENERAL MOTORS CORPORATION

RECEIVED BY COMPLETE AUTO TRANSIT, INC. AT:

ATLANTA	CINCINNATI	DORAVILLE	FLINT	ST. LOUIS	WILLOW RUN
DALLAS	JACKSON XX	JACKSONVILLE	MIAMI	SHREVEPORT	TAMPA

BAY NO. 32

LOCATION CODE AND WAYBILL NO. 11-409852

CONSIGNED TO
HAWKINS CHEV INC
CALHOUN CITY MISS
17294

DATE RECEIVED AT TERMINAL 2 3 A.M. P.M.

DATE DISPATCHED A.M. P.M.

DRIVER CARPENTER, JOHN 11-9252

TRACTOR NO. 2111716760

TRAILER NO.

MODEL—COLOR	SERIAL NO.		MILEAGE
CE141 CE10954 Z18	A606870	PJ0969	146

EC

PRODUCING PLANT ATL

SHIPPING 2 1 71

RAILROAD CAR NO. 550928

WAGE ADVANCE

ROUTE 2-1-33-32-7-30-15-

THE UNDERSIGNED, BEING DULY AUTHORIZED BY CONSIGNEE, HEREBY CERTIFIES THAT THE ABOVE CARS HAVE BEEN THOROUGHLY INSPECTED AND FOUND IN GOOD CONDITION AND CONTAINED ALL TOOLS, MATS, ACCESSORIES, AND OTHER EQUIPMENT, UNLESS OTHERWISE NOTED BELOW.

EXHIBIT C-1-F

WITNESS

JUN 12 1974

MARY BURKETT Reporter

DEALER Hawkins Chev Inc

DATE RECEIVED 2.6.71

TIME RECEIVED 11:30

CHECK WHICH A.M. ☑ P.M. ☐

ORIGINAL DELIVERY RECEIPT

FORM 51 REV. 5/67 SEE REVERSE SIDE FOR MAILING ADDRESSES

Exhibit C-1(G)

Statement of Charges

Inbound ☒ Outbound

Do Not Include Both On Same Bill

Date Feb. 16, 1971

WITNESS

JUN 12 1974

MARY BURKETT Reporter

Attached Find Bills Listed Hereon Presented For Payment Due On

All Other Carriers — Submit in Duplicate

Must Be Typewritten Do Not Fold

Distribution

GM ASSEMBLY DIVISION
GENERAL MOTORS CORPORATION
LAKEWOOD PLANT
P. O. BOX 4605
ATLANTA, GEORGIA 30302

Atlanta, Ga. Plant
Jackson, Miss. 82-71

Carrier's Name: COMPLETE AUTO TRANSIT, INC.
P. O. BOX 5326 — ST. LOUIS, MISSOURI 63115

Address:

FEB 16 1971

COMPLETE AUTO TRANSIT, Inc.

CO 1654 REV 12-65

Pro Date	Pro Number	Shipper—Inbound Consignee—Outbound	Car Number Or No. Of Pkgs	Weight	Amount Of Bill	Sundry Acct	Sundry Amount	Receiving Slip Or Shipper No.
2-2	25	Atlanta, Ga. Jackson, Miss.	30		1,472.05			

Exhibit C-1(H)

REMITTANCE ADVICE- PREPAID OUTBOUND FREIGHT ON NEW CARS AND TRUCKS

TO: COMPLETE AUTO TRANSIT, INC.
P. O. BOX 5326
CHARLES BRIDGE STATION
ST. LOUIS, MISSOURI

FROM: GM ASSEMBLY DIVISION LAKEWOOD PLANT
P.O. BOX 4605
ATLANTA, GEORGIA 30302 [redacted]

DATE 02-02-71

RTG. CODE	SHIPPERS NUMBER	DATE SHIPPED	WAYBILL NUMBER	CAR NUMBER	AMOUNT
030	10 7-0078	02-02-71	6396-002-70078	BTTX-550928	527.75
030	10 7-0087	02-02-71	6396-102-70087	BTTX-500761	457.75 OK
030	10 7-0098	02-02-71	6396-102-70098	SP-515355	486.55 OK
	30 3 CARDS				1,472.05

EXHIBIT C-1-H
WITNESS

JUN 12 1974

MARY BURKETT Reporter

FEB 16 1971
2612
COMPLETE AUTO TRANSIT, Inc.

[5] By Mr. Cannada: We next want to offer as Exhibit C-2 by agreement between the parties as being a true and correct copy of the certificate of Mr. E. W. Robinson, Executive Secretary of the Mississippi Public Service Commission.

By the Court: Let it be marked and entered.

(The certificate of E. W. Robinson introduced by agreement was marked and entered as Exhibit C-2 and is as follows:)

Exhibit C-2

MISSISSIPPI PUBLIC SERVICE COMMISSION

J. W. SNYDER, CHAIRMAN
EUPORA - THIRD DISTRICT

NORMAN A. JOHNSON, JR., VICE-CHAIRMAN
PHILADELPHIA - FIRST DISTRICT

JOHN L. DALE, COMMISSIONER
LUCEDALE - SECOND DISTRICT

BENNETT E. SMITH
ASSISTANT ATTORNEY GENERAL

E. W. ROBINSON
EXECUTIVE SECRETARY
WALTER SILLERS STATE OFFICE BLDG.
P. O. BOX 1174
JACKSON, MISSISSIPPI 39205

November 2, 1973

DOUGLAS H. BRUMFIELD
CHIEF ACCOUNTANT

G. S. WATROUS, JR.
CHIEF ENGINEER

G. D. ELLIOTT
DIRECTOR OF TRANSPORTATION

KEITH HOWLE
DIRECTOR OF UTILITIES

JOHN MITCHELL
CHIEF LAW ENFORCEMENT OFFICER

STATE OF MISSISSIPPI

COUNTY OF HINDS

I, E.W. Robinson, do hereby certify that I am Executive Secretary of the Mississippi Public Service Commission, and as such I am the legal custodian of the records of said office, and that the attached is a true and correct copy of the Permit and Certificate of Convenience and Necessity issued to Complete Auto Transit, Inc. on May 8, 1940, and entered in docket MC-478 - Permit 334, and recorded in Minute Book No. 14, Page 364, of the Mississippi Public Service Commission Records.

I further certify that this Interstate Permit constitutes the only authority granted to this motor carrier by the Mississippi Public Commission as shown by the official records of the Commission.

WITNESS, My Hand and Official Seal of the Mississippi Public Service Commission on this the 2nd day of November, 1973.

E. W. Robinson
E.W. ROBINSON, EXECUTIVE SECRETARY

EWR:jmr

MISSISSIPPI PUBLIC SERVICE COMMISSION
JACKSON, MISSISSIPPI

MC-473 IN RE: Application for an interstate
Complete Auto Transit, Inc. permit.

ORDER

This matter came on for hearing before this Commission on this date upon application filed by:

Complete Auto Transit, Inc.
517 Cadillac Street
Flint, Michigan

asking for an interstate permit as a contract carrier by motor vehicle for the carrying of property in interstate commerce only in the State of Mississippi.

Upon due consideration of this matter the Commission, in regular meeting duly organized, is now of the opinion that a permit should be granted.

It is therefore ordered by the Commission as follows:

1. That Permit No. ____ issue to Complete Auto Transit, Inc. _____ authorizing the transportation of property in interstate commerce only over the same route or routes in Mississippi, that have been or may be authorized in Mississippi, by the Interstate Commerce Commission upon the filing of an insurance policy, satisfactory to the Commission, in the sum of $5000.00 for the death or injury to any one person; $10,000.00 total public liability for any one accident; property damage $5000.00, in compliance with the Motor Carrier Regulatory Act, Mississippi Laws 1938.

2. A permit to issue by virtue of Motor Carrier Regulatory Act of Mississippi Laws 1938, to

Complete Auto Transit, Inc.

and IT will thereafter be entitled to all privileges and charged with all penalties prescribed by said law, by virtue of said operation as a Contract carrier.

3. And it is further ordered that the Secretary of this Commission shall issue to the applicant

Complete Auto Transit, Inc. a permit

when said applicant shall have complied with all the rules and regulations of this Commission, and requirements of the Motor Carrier Regulatory Act, 1938.

Ordered by the Commission this the 8th day of May, 1940.

D. W. Brown
Secretary

CC:
Applicant-

Application No. ~~MC-473~~

Docket No.

Permit No. 334

Approved May 8, 1940

Issued May 27/40

Permit

Upon consideration of the record in the above numbered application, it is therefore ORDERED: That authority be and it is hereby granted to:

COMPLETE AUTO TRANSIT INC.

Whose principal address is FLT. "ICHIG", 617 Cadillac St.

as a CONTRACT CARRIER OF PROPERTY- INTERSTATE

to transport PROPERTY

In accordance with the Rules and Regulations of the Commission and the "Mississippi Motor Carrier Regulatory Act, 1938," approved April 6, 1938, on and along the route or routes described in Minute Book 14 at page 304 of the minutes of the Mississippi Public Service Commission.

This Permit shall remain in effect until the further Orders of the Commission.

BY ORDER OF THE MISSISSIPPI PUBLIC SERVICE COMMISSION.

Secretary

Chairman

[6] By Mr. Cannada: We would like to call Mr. Frank Sudduth as an adverse witness.

MR. FRANK L. SUDDUTH,

called as an adverse witness by Complainant, having been duly sworn, was examined and testified as follows:

Cross Examination

By Mr. Cannada:

Q. Would you give your name to the reporter? A. Frank L. Sudduth.

Q. For whom do you work, Mr. Sudduth? A. I work for the Mississippi State Tax Commission.

Q. In what capacity do you work for that Commission? A. I work in the Special Audit Division of the Tax Commission.

Q. How long have you been in that work? A. Almost ten years.

Q. In your capacity in the Special Audit Division, what are your primary duties? A. The primary duties of the whole division are to go out of state, out of Mississippi, to make audits for sales, income and franchise and use taxes on foreign corporations.

Q. Have you done that with reference to Complete Auto Transit? A. Yes, I have.

[7] Q. Would you tell us what you did and how you did it? A. The purpose of my visit with Complete was to make a sales tax audit. I first went to Detroit, thinking the audit would be made there. They referred me to the St. Louis office, saying the records I was requesting was in St. Louis. After a brief meeting in Detroit, I left and came back to Jackson and subsequently set up an appointment in St. Louis. Once the appointment was established, I arrived there to make an audit. I went over with the people that I was dealing with, describing

to them what I was there for, and what I wanted. They made available to me the records that I had requested, and I abstracted the information from these records to come down to a taxable base and assessed the tax on that income.

Q. You went there with the idea in mind of assessing this particular tax that is involved in this litigation? A. That is true.

Q. How did you go about determining the amount of that tax, Mr. Sudduth? A. You mean the details of the audit?

Q. Yes, if you would. A. Well, there are two basic sources of information. Let me get my work papers, if I could. The revenue that I was working with was broken down into two different areas. The first area, which accounts for roughly 90 percent of the tax, was related to what they call [8] analysis of shipments which is an IBM listing representing revenue earned in Mississippi. In other words, this is revenue that they had received from the transportation of automobiles from the Jackson Terminal to other locations in Mississippi. This represents also what they call whole shipments to points within Mississippi. These were broken down fairly convenient for my purposes in that they were for Mississippi revenue and they were broken down by months, so all I had to do was pick those up for the period I was to cover.

The other area was a little bit more complicated in that it related to what they call drop shipments. A drop shipment is when—if they have an order say to go to Monroe, Louisiana for say three cars and they also have an order to go to Vicksburg say for two cars, on the shipment that goes to Monroe, they will drop the two cars off at Vicksburg. So the way we arrived at that, they didn't have any complete records for that like they did on the whole shipments with reference to the analysis

of shipments listings, so what we agreed to do was to take four months, March, April, May and June, 1971. We took what they call the waybills, and the other auditor and myself listed all waybills for these four months and came up to a total for Mississippi transportation only, of course. In taking this total, we had picked up the total revenue for the whole shipments and the drop shipments. Once we got this total, we took a percentage of that to the total on the analysis of shipments run which represented [9] whole shipments. We got a percentage there and averaged that percentage of the four months to project over the audit period the amount to be represented as earned from drop shipments. We combined these two together for the total taxable base.

Q. In other words, as I understand it, the issue here involved is vehicles that are being shipped from a General Motors plant somewhere in the United States located out of the State of Mississippi to General Motors dealers located in Mississippi. These are the vehicles with which you are concerned, is that right, the revenue from those vehicles? A. Yes, only to the extent that they come through the Jackson Terminal.

Q. I want to make sure we understand. So that vehicles, for instance, that were shipped by General Motors' plant by this same carrier, Complete Auto Transit, from a plant we will say in Atlanta that was brought directly by truck all the way from Atlanta to a dealer in Mississippi, you would not impose a tax on any portion of that transportation? A. No.

Q. So that was eliminated to start with? A. That is right.

Q. Then a vehicle that was picked up by Complete Auto at the railroad ramp in Jackson and transported into Louisiana or Tennessee or Alabama was not included in your computation? [10] A. No, it was not.

Q. So that what you have included in your computations are vehicles that were picked up by this transportation company at the loading ramp at the railroad here in Jackson and delivered by this Complete Auto Transit to a General Motors dealer in Mississippi? A. That is correct.

Q. And as I understand what you have said that on the vehicles that are used by Complete Auto to transport these new motor vehicles on one load there may be say six or seven cars, and that three of those cars may be destined for a dealer in Mississippi and three of them may be destined for a dealer in Alabama? A. That is correct.

Q. So that it would be the same vehicle and the same driver. He would just on his way to Birmingham, for instance, maybe drop off three cars at a dealer in Meridian and take the other three cars to a dealer in Birmingham? A. That is correct.

Q. So this is the problem that you were having, is that where you had a vehicle that delivered its entire load to dealers in Mississippi, you applied a five percent sales tax to the entire gross receipts from that particular operation? A. That is true. That is the way they had it broken out on their what I have called the analysis of shipments. That is what I had asked for and to the extent of arriving at this portion, we used this.

[11] Q. That is right. I am just trying to make sure that I understand and that we get the Court to understand what we have done. So that essentially you were attempting to determine the total gross receipts of this carrier for all income that it received from shipments that were delivered to it at the railroad ramp here in Jackson and carried by it to dealers located in Mississippi? A. That is correct.

Q. And of course where a whole truckload stopped in Mississippi, that was comparatively simple, but where part of the load was in Mississippi and part was out of Mississippi, this is where you have done the averaging? A. That is correct. You said averaging. We actually used a four month sample to get an average percentage and projected that percentage.

Q. For the three years involved? A. Right.

Q. There were four years involved, were there not? A. Three years. Oh, now are you talking about one audit or two audits?

Q. Two audits. A. Okay.

Q. For purposes of the record, what years are involved in this tax, if any was paid? A. For the first audit, the period covered was from August 1, '68 through July 31, '71. This was the audit that I did. The next audit covered the period [12] 8/1/71 through July 31, '72.

Q. And what was the tax for those particular audits, if you would, Frank, and what was paid, when was it paid? A. The total paid on the first audit was $124,384.49.

Q. When was that paid? A. I don't have the date of payment. It was paid, though. The second audit, the total amounted to $42,990.89, again including interest.

Q. And that was for the fiscal year ending July 31, '72? A. That is correct.

Q. There won't be any more of this? A. I don't think so. As of right now, it won't be.

Q. It is in the pleadings. The whole statute imposing this tax, even on intrastate, was repealed effective July 31, '72, was it not? A. That is correct.

Q. So that even intrastate carriers no longer have to pay this tax? A. That is correct.

Q. In your checking, Mr. Sudduth, did you find that Complete had ever paid this tax in its operations in Mississippi? A. To my knowledge they have not ever paid it, that is correct.

[13] Q. And really, they have been operating here for many, many years, have they not? A. Yes. That is true.

Q. So that what you basically did, you went back for three years and imposed the tax and you didn't go beyond August 1 of '67? A. I didn't go back prior to August 1, '68.

Q. 1968? A. Right.

Q. In other words, you just assessed the tax for three years even though there was no record of them ever having paid this tax? A. That is true.

Q. Then after your audit, the next auditor brought it on up to date to the time that the statute was repealed and made an assessment up to that time? A. Yes, you are correct, since he brought it up until July 31, '72. You are correct.

Q. You brought the tax up until the statute was repealed? A. Yes, that is right.

Q. And this is the money that is in controversy in this case, isn't it? A. That is correct.

Q. This procedure that you have adopted is based upon Complete hauling exclusively from General Motors manufacturing plants or assembly plants somewhere outside the State of Mississippi. It is all General Motors. In your records you saw nothing but General Motors shipments, [14] isn't that correct? A. Yes, that is correct.

Q. You understand, don't you, that the Complete Auto Transit is a carrier certificated by the Interstate Commerce Commission as a contract carrier? A. Yes, that was mentioned to me when I was in Detroit when we had this brief meeting in Detroit. That was mentioned that they had an ICC certificate. That is true.

Q. And that they actually had their rates and charges for each particular vehicle on file with the Interstate Commerce Commission as to what would be charged General Motors for each of these vehicles. Did you realize that? A. No, I wasn't aware of that.

Q. You weren't aware of that when you made the audit? A. No.

Q. That there is a specific charge for transporting each vehicle that has been approved by the Interstate Commerce Commission, but you did not realize that? A. No, I did not.

Q. Now, Mr. Sudduth, in addition to this tax, as a matter of fact isn't it true that this company, Complete Auto, has for many years paid the State of Mississippi an income tax? A. No, they hadn't been filing income tax to the best of my knowledge until I called on them.

Q. Are you mentioning about franchise tax or income tax? [15] A. Income tax and franchise tax. This is to the best of my knowledge.

Q. Well, as a matter of fact, as of today the Complete Auto has paid income taxes to the State of Mississippi, isn't that right? A. Yes, it has.

Q. For the time involved here? A. Yes. They have filed returns covering this period.

Q. And paid tax? A. Correct.

Q. And as a matter of fact, the formula used in determining the income tax to be paid by this carrier involves the factor of the ton miles that are operated by vehicles in the State of Mississippi, isn't that correct? A. I couldn't verify that. I would have to check their returns.

Q. Well, as a matter of fact, this is what the regulations—this is the way you would determine it for a carrier carrying freight? A. Or perhaps on a mileage basis, Mississippi mileage to total mileage.

Q. That is right. Well, it is a mileage basis. In other words, the miles in Mississippi compared with the miles operated systemwide to get your percentage, and then use that percentage and apply that to your net income systemwide? A. That is correct.

[16] Q. And then report that income to the State of Mississippi, so that under the income tax payment that the company has made to the State of Mississippi, they have paid income tax based upon the miles operated in Mississippi, that is correct, isn't it, measured by the receipts from these operations? A. I will have to check the returns to say they did. We have been discussing what would be proper, the method that would be proper for them to report under the law.

Q. All right. This would be the proper method? A. Yes.

Q. And if the tax was paid, presumably that would be the method that was used in determining the income tax? A. That is correct.

Q. And it would be—the factor used there would be the gross receipts or the net income. It is a factor measured by the gross receipts from the Mississippi operations? A. You are talking about income?

Q. Income tax. That is right. A. In other words, the factor that we have been talking about . . .

By Mr. Haddock: Your Honor, may I object to this being brought in? This, as far as we are concerned, I don't think has anything to do with the income tax matter—has anything to do with the sales tax matter, and he is not prepared—he hasn't reviewed this information about their [17] income tax. We will concede that they have paid whatever income tax is required, if that is true.

By the Court: If it is true, the question could be testified to.

By Mr. Cannada: If the Court please, I don't want to burden the record, but I do think it is reasonably important to get, if this witness knows, fine, and if he doesn't . . .

By the Court: What relationship does it have to this case?

By Mr. Cannada: The relationship basically is to show the various taxes that have been paid by this company on this same haul. We think this should be in the record.

By the Court: This isn't a jury case, Mr. Cannada, and I don't think that would have anything to do with whether or not it owed this tax. I sustain the objection. If you want to make a record or state into the record what you intended to prove, you may do that.

By Mr. Cannada: May I put this in the record, then, that if permitted to do so, our purpose in this kind of examination would be to show that this company has paid income taxes to the State of Mississippi during the years involved in this case which income taxes were based upon and in accord with the regulations of the Mississippi State Tax Commission which regulations use as a portion of the formula in [18] determining the tax due the mileage actually operated within the State of Mississippi as compared to the total miles operated by the company, and this percentage is then applied to the net income of the company systemwide to determine the portion of the income that is attributable to the Mississippi operations and on which Mississippi income taxes are paid.

We would also propose to show by this witness that basically the same procedure was followed in determining the amount of franchise taxes due by this company to the State of Mississippi, which taxes have been assessed and have been paid for the same years involved, and that in computing the franchise taxes due and which have been paid, the factor of the gross receipts from the oper-

ations in the State of Mississippi was a factor used in determining the amount to be assessed for franchise taxes against this company, which taxes have been assessed and have been paid for these years.

By the Court: All right. I still sustain the objection.

By Mr. Cannada:

Q. Mr. Sudduth, you understand that it is the position of Complete that this tax is not applicable, the tax involved in this lawsuit is simply not applicable to their operations in toto, the shipments that went all the way in Mississippi or the shipments that went partially in Mississippi and partially in other states; that is correct, isn't it? [19] A. You mean that they came from outside of Mississippi?

Q. Yes. A. You mean enter Mississippi from an outside of Mississippi plant?

Q. No, basically what I am trying to say is that you understand in your talk with Complete and all the way through that their position basically is that they are not liable for this five percent tax on any of their hauling in the State of Mississippi? A. That was their view.

By Mr. Cannada: Yes, sir. I have no further questions.

Direct Examination

By Mr. Haddock:

Q. Mr. Sudduth, just one or two questions here. Under what authority of law or laws did you make this assessment? A. The section in the law is Section 10109 of the Mississippi Code of 1942.

Q. Would you read that section to the Court, please, of the Code? A. This is subparagraph 2 under that section I cited which reads as follows:

> "Upon every person operating a pipeline, railroad, airplane, bus, truck or any other transportation business for the transportation of persons or property for compensation or hire between points within this state,

> there is hereby levied, assessed, and shall be collected a tax equal to five percent of the gross income [20] of such business except persons operating local transit buses shall be exempt from such tax, and upon persons operating taxicabs within municipalities or within four miles thereof, there shall be collected a tax equal to two percent of the gross income of the business."

Q. Now, may I ask you why you made this assessment on Complete Auto Transit Company? A. The purpose in making the assessment was based primarily on the section that I just read to you.

Q. Will you elaborate on that a little bit further as to the actual mechanics of the request for you to make the assessment? A. Well, I was . . .

By Mr. Cannada: If the Court please, I don't know that that has any bearing on the case. I would object to it.

By Mr. Haddock:

Q. We will withdraw the question. What percentage of the amount in question here is involved in the transportation charges from Jackson to dealers within the State of Mississippi? A. You have reference to the drop shipments?

Q. No, sir, I am talking about the straight—the shipments completely—total shipments that were going from Jackson to dealers in Mississippi. A. The total percentage is roughly 92 percent of the total taxable base.

Q. Ninety-two percent of the assessment is for transportation—sales tax for transportation charges from Jackson to Mississippi dealers, exclusively? [21] A. On whole shipments.

Q. On whole shipments? A. That is true.

Q. What percentage would be involved in these drop shipments? A. I have that percentage for the second

audit. The percentage was 7.923 percent. The first audit was 8.828 percent.

By Mr. Haddock: That is all of the questions we have of this witness at this time. We will recall him later.

By Mr. Cannada: We have no further questions.

By the Court:

Q. You may be excused. Let me ask this question. The drop shipments, were they all originated in Jackson, or were you speaking of drop shipments from outside the state?

By the Witness:

A. All the shipments that we are talking about originated from the Jackson terminal insofar as Mississippi is concerned.

By the Court: You may be excused.

(Witness Excused)

By Mr. Cannada: We call Mr. Flanagan.

MR. JOHN FLANAGAN,

the next witness called by Complainant, having been duly [22] sworn, was examined and testified as follows:

Direct Examination

By Mr. Cannada:

Q. Would you give your name to the reporter, please? A. John Flanagan.

Q. For whom do you work, Mr. Flanagan? A. I work for General Motors Corporation.

Q. How long have you worked for that company? A. About fifteen and a half years.

Q. What title do you have with that company? A. I am Manager, Vehicle Transport Distribution Planning.

Q. How long have you held that title? A. Approximately four years.

Q. Mr. Flanagan, what are your duties and were your duties in your capacity with General Motors? Just generally give them to the Court. A. My primary duty is arranging for the transportation of motor vehicles within the U.S., principally between assembly plants and dealerships.

Q. A little louder if you would, please sir. A. Principally between the assembly plants and the dealerships in a prompt, efficient, economical manner.

Q. What does that entail? A. That entails rate negotiations with the railroads and haul-away carriers, entails the establishment of railroad ramp locations in conjunction with railroads [23] where required, and advising the carriers for equipment planning purposes of items to anticipate and of any production changes that will drastically change the methods of transportation that we are using. We have twenty-five assembly plants in the U.S. and three in Canada, all of whom ship to the U.S. dealerships. We have currently fifty-two rail ramp locations throughout the U.S. over which we use a combination of the rail and truck-away transportation.

Q. Now with reference to these particular shipments that are involved here from your various plants outside of Mississippi to your General Motors dealers in Mississippi, what did you do? What was your responsibility in connection with those shipments? A. One of my responsibilities is to advise the assembly plant traffic managers the methods to use to the various dealerships. A good many of the shipments into Mississippi as well as parts of Louisiana, parts of Arkansas, parts of Tennessee, and parts of Alabama would be economical over the Jackson ramp depending upon what assembly plant was shipping.

Q. Let's go back. Basically, did I understand your testimony correctly when you say you told the assembly plants the transportation to be used to get the manufactured vehicles to the dealers? A. That is correct.

Q. And you gave all of the plants that you have listed here, the assembly plants, those instructions as to [24] how to ship the finished motor vehicles to the dealers? A. That is correct.

Q. And you did do that during the entire period of time involved in this litigation with reference to the automobiles that came into Mississippi? A. Yes, for all intents and purposes.

Q. Now in doing this, how did you determine what to tell the various assembly plants as to how to ship these finished vehicles? A. The method we used to tell them?

Q. Yes, and how you went through whether to use truck-away with an explanation, or whether to use rail, or how did you go about it? A. My people are making studies continuously because of changes in the rate structures such as rail rate increases or truck-away rate negotiations that have an impact on the rates that we pay. Therefore, what is the most economical, efficient and prompt manner in which we ship from a plant to a dealership may change from model year to model year. It may change because of production.

Q. Talk a little louder, please, and talk to the judge. A. It may change because of production. It may change for a number of reasons, but basically our studies incorporate how long does it take us to get from this plant to this dealer by various methods. One may be direct truck-away. One may be by the Jackson ramp. One may be by way of the Memphis ramp, for example. In this particular area we have [25] a ramp at Memphis, Tennessee, a railroad ramp that we use at Memphis, Tennessee and Birmingham, Alabama, at New Orleans, Louisiana, and Shreveport, Louisiana as well as the one here in Jackson, Mississippi.

Our instructions when they get to an assembly plant are put in the form of a code on the dealer name and

address file that is maintained at the assembly plant, so that if an order comes from that dealer and is sent to that assembly plant, it is coded in that manner, and when the traffic manager sees that code, he knows he is to ship that by one method or another, that particular code standing for the method we want to use.

Q. Mr. Flanagan, under your dealer-seller agreement with your dealers, where do you send the finished automobiles? Do you send them to a town, or do you send them to the dealer's location, or just where do you send them? A. We send them to the dealer's location.

Q. Was that true at all times during the period of time involved here? A. Yes. This period, that is correct.

Q. Your obligation was to ship the vehicle to the dealer? A. That is correct.

Q. How do you get an order in the first place? A. Well, an order is placed by a dealer during this period of time. I would say it was, using Chevrolet as an example, placed in the mail with the Regional [26] Processing Center which in turn checks that order to make certain that it is a buildable order. For example, they haven't order two engines for a vehicle or what have you. Then it is passed on to Detroit and at that point sent to the assembly plant. At Detroit they are checked for tie-in to inbound materials to that plant so that that vehicle can be produced. Then it is sent to the plant and it is exploded into a production language, you might say.

Q. My question basically is this. Is the—are the automobiles just manufactured and placed on the lots, or are they manufactured basically pursuant to an order from the dealer? A. They are manufactured on dealer orders.

Q. On dealer orders? A. That is correct.

Q. So from the time the automobile begins being assembled, it is assembled for a particular dealer? A. That is correct.

Q. So that by the time it is finished, do you know where that automobile is to be sent? A. Yes, we do.

Q. Where? A. To the dealer's location.

Q. And under your dealer arrangement, the transportation is to be sent, as I understood you, to the dealer's location in a particular city? A. That is correct.

Q. And as I understand your testimony, it is [27] your responsibility to get it from the assembly plant to the dealers? A. Yes, sir.

Q. To determine how it gets there? A. Yes, sir.

Q. Are there any assembly plants located in Mississippi? A. No, there are not.

Q. So that the original transportation of the automobiles begins from outside of the State of Mississippi? A. That is correct.

Q. In working out your transportation, I understood you to say that in some instances the new vehicles are all taken by truck. Why is that true, taken the whole distance by truck? A. Number 1, it is usually a prompter service than when we become involved with rail transportation.

Q. A little louder, please. A. When we become involved with rail transportation, it is longer. Number 2, essentially we have to deliver all vehicles ultimately to the dealerships by highway transportation because of the mere fact that dealerships are not located on rail sidings. The economics, of course, of shipping 50 miles from a plant to a dealership by truck-away is obvious. We wouldn't want to become involved in rail transportation. However, there are a number of plants shipping nationwide our products. We have had quite a proliferation of products over the years. We are no longer in an era where we have an [28] assembly plant in a nice, little neat area of the country to which he serves. We have many shipping nationwide. Because of this, rail

transportation over the long haul is more economical. Railroads in the late 50's, their percentage of the total transportation of General Motors finished products was below 20 percent by volume, and in order to become more competitive, they did offer at that time—I mean at that time we would be loading four vehicles into a rail car and this was relatively expensive on a per vehicle basis. The railroads did come up with a so-called multi-level rail car which is the series of two or three levels, one above another. I am sure you all have seen one around, probably, which enabled us to negotiate rates based on shipping anywhere from eight to at that time fifteen units. This did bring down the cost to us on a per vehicle basis over a long haul.

These railroads recognized that we had to make deliveries to our dealerships; therefore, they established what we refer to as railroad ramps which is an interchange between the railroad who solicited the business and a beyond carrier, a truck-away carrier. In all instances we did arrange for the—or select the truck-away carrier we desired at the ramp interchange. From then on, the railroad participation increased substantially.

Q. Now as I understand your testimony, you in arranging the transportation for economic reasons, in some instances you would arrange it by trucks all the way from the assembly plant to the dealer? [29] A. Yes, that is correct.

Q. Where the distance was economically to a disadvantage, you would arrange it by rail to the general area of the dealer and then by truck the rest of the way to the dealers? A. That is correct.

Q. And you designated either common carrier or a certificated carrier to pick it up from the railroad and carry it on to the dealer? A. That is correct.

Q. Now in working out your arrangements to complete the transportation to the dealer, do you have contracts with certificated carriers that are certificated by the Interstate Commerce Commission? A. Yes, we do. We use contract carriers and common carriers. In the case of the contract carrier, there are agreements, contracts. They are on file with the Interstate Commerce Commission.

Q. I understand that you did make arrangements with certificated carriers to complete the haul. Would you tell the Court what kind of carriers you made arrangements with? Were they all common carriers? A. No, they were not, both common and contract carriers.

Q. By common carrier you mean railroads or trucks that have certificates to operate over certain routes and they are, of course, available to anybody that wants to use them? A. Yes, that is correct.

[30] Q. And so that you have available to you all the railroads and the common carriers that serve the area of a particular assembly plant? A. Yes, sir.

Q. Did you also enter into arrangements with contract carriers? A. Yes, we did.

Q. How many would you say basically, roughly, have you entered into with different carriers? A. Currently we have three contract carriers.

Q. Do they serve wide areas? A. Yes. Our two largest highway carriers are contract carriers, Complete being one of them.

Q. Did you have a contract with complete Auto Transit? A. Yes, sir.

Q. Would you explain to the Court how the contract carrier functions and what kind of arrangements and contracts you have with them? A. The contract carrier functions in a similar nature to a common highway carrier in that he transports the vehicles from—at either an intermediate point from the assembly plant to the dealer or

directly from the assembly plant to the dealer. A contract that we enter into with him—in this case was dated back in 1942, the original contract, since amended in accordance with the provisions of the contract. We find the contract carrier to be a more devoted carrier if he is a contract carrier. There are pluses or minuses on either [31] side as far as contract versus common, but historically several of our divisions have used contract carriers and we have not put either one of them out of business because of a preference of one over the other.

Q. As I understand it, you negotiate a contract with Complete, as an illustration, for services in transporting vehicles from assembly plants or anywhere else that you want them to take possession and from that point to a dealer, is that correct? A. Yes.

Q. So you enter into such a contract. Is that then submitted to and approved by the Interstate Commerce Commission? A. That is, yes.

Q. Is the contract carrier then issued a permit or certificate to engage in these operations called contract carrier operations? A. Yes, he is.

Q. Do they then file with the Interstate Commerce Commission a schedule of the charges which is called a tariff that they will—that you will pay to them for these services? A. That is correct.

Q. Was that done by Complete? A. Yes, it was.

Q. Was that done at all times while this operation here involved was in effect? A. Yes.

[32] Q. And the rates basically were based upon each vehicle, the size of the vehicle, and the miles that it was transported, and that gave you the total that you would pay to Complete for transporting this vehicle? A. Yes, that is correct.

Q. That was true all during the term of the four years involved in this tax case? A. Yes, sir.

Q. Did you have a similar arrangement with other contract carriers? A. Yes, we do have. For example with Complete, Complete serves six of our assembly plants, and I would say five of the rail ramp locations, one of which is located here in Jackson, Mississippi. Another large carrier would be Anchor Motor Freight, a large contract carrier that handles principally traffic or vehicles, motor vehicles originating at our eastern plants and many of the railroad ramps in the East. On the West, we have Pacific Motor Trucking as another contract carrier handling the vast majority of our vehicles within California from our three plants in California.

Q. In all of these instances the procedure followed is essentially as you have followed it with Complete in getting it from the assembly plant to the dealer? A. Yes, that is correct.

Q. Using in some instances a combination of rail part of the way and then the contract carrier the rest of the way, or in some instances the contract carrier the entire journey? A. That is correct, yes.

[33] Q. If you would, Mr. Flanagan, explain to the Court exactly what is done insofar as General Motors is concerned and the procedure you expect the carriers to do from the time this vehicle which I understand has been ordered by a particular dealer? A. Yes.

Q. From the time it leaves the assembly plant. A. On a movement, for example, over Jackson, Mississippi ramp?

Q. Yes, to the Jackson ramp. A. The cars—I shouldn't say cars—the motor vehicles are produced. If they are passenger vehicles or station wagons, a so-called price label is affixed to the window stating the destination of the vehicle to be delivered to a specific dealer. The paper work does vary somewhat from plant to plant, but the paper work basically is arranging an

agreement with the railroad to transport 12 or 15, whatever we can load on a rail car, from the plant to Jackson, Mississippi, and information is given to Complete Auto Transit who is our route at Jackson, Mississippi that these cars are coming and to prepare themselves to move them in an expeditious manner under our contract to the dealers.

Q. Mr. Flanagan, I hand you a document. See if you recognize what that is? A. This is a dealer copy of the price label. It would accompany the car in the glove compartment.

Q. Is that typical of the type of thing that you testified is affixed to the window of all automobiles when they leave the assembly plant? [34] A. Yes.

Q. This isn't involving time here, but this is the type thing that is affixed? A. Stipulated by federal law.

Q. This must be affixed on every car? A. Yes.

Q. And it is affixed on every automobile when it leaves the assembly plant? A. Every passenger automobile, yes.

By Mr. Cannada: We would like to offer this as an exhibit to his testimony.

By the Court: Let it be marked and entered.

(The document introduced by Complainant on direct examination of the witness Flanagan was marked and received in evidence as Exhibit C-3 and is as follows:)

Exhibit C-3

CAR LABEL

Dealer Copy

BLACKWELL CHEVROLET
JACKSON, MS 39206 -039

X789 Dealer Order No

1N47 4 1C5x ST. LOUIS, MI CUR1

4,117.90

1BN47 CAPRICE CLASSIC - V8

1 SOFT-RAY TINTED GLASS	49.00
7 DOOR EDGE GUARDS	6.00
2 COLOR-KEYED FLOOR MATS	12.00
0 FOUR-SEASON AIR CONDITIONING	405.00
3 REMOTE CONTROL REARVIEW MIRROR-L	12.00
6 TURBO-FIRE 400-2 BBL. V-8 ENGINE	.00
2 COMFORTILT STEERING WHEEL	44.00
1 G78X15/B BELTED W/STRIP TIRES	32.00
1 AM RADIO	65.00
2 REAR SEAT SPEAKER	15.00
1 LIGHT NEUTRAL VINYL TRIM	18.00
T VINYL ROOF COVER - CREAM-BEIGE	86.00
L GOLDEN BROWN METALLIC	.00

5

5057

764.00

1,181.90

5,347.90

BEST COPY AVAILABLE

[35] By Mr. Cannada:

Q. Mr. Flanagan, with reference to C-3 which is an illustration, there is affixed to the window or windshield of every automobile a document similar to this. This one shows Blackwell Chevrolet Company, Jackson, Mississippi. Is that the name of the dealer? A. Yes.

Q. Is the name of the dealer always shown and his address on this car label that goes on the car? A. Yes.

Q. It has some figures here 2RX789. What does that mean? A. That is the dealer order number.

Q. In other words, you had gotten an order from Blackwell for this particular motor vehicle and you manufactured it pursuant to that order and this is filling that order, is that correct? A. Yes.

Q. Keep that, if you would. Then what is that next number down there, IN47R etc.? A. IBN47?

Q. Yes. A. That is the model number.

Q. Or serial number? A. No, it looks to me to be a model number of the vehicle. The ident. number is not shown.

Q. What is the IBN47? A. That describes the type of vehicle, the year 4 being '74 model year. The 1 represents Chevrolet Division. [36] The B represents a B body type vehicle of which the Caprice Classic is the top of that particular line. The N and the 7 I am just not certain of that.

Q. Essentially what you have testified to is that every automobile, pursuant to federal law, when it leaves the assembly plant has the dealer as the destination from the time it leaves the plant of the automobile? A. Yes.

Q. Information similar to this? A. Yes.

Q. I believe you testified on commercial vehicles the law did not require that? A. That is correct.

Q. What do you do about commercial vehicles? A. Usually, I would say a form similar to that, most often

called a car sticker, which describes the destination or the dealer location and the dealer's name is placed in the glove compartment of such vehicles, and it is very similar in nature to that which we have just reviewed there.

Q. So that there is an identification on each vehicle from the time it leaves the plant as to where it is to be ultimately received at the dealer? A. Yes.

Q. And that is true from the time it leaves the assembly plant as to every vehicle? A. Yes.

Q. Now, the motor vehicle has left the assembly plant with the sticker on it or with the sticker in the glove [37] compartment if it is a commercial vehicle, showing the dealer destination in Jackson, Mississippi. What does General Motors do at that point in time? A. We advise—in this case it would be Complete Auto Transit—the assembly plants advise them. During the period in question, that advice would be either—advance notice would be either by mail or sometimes by wire at other facilities so that they could prepare themselves to handle these vehicles, make them up into loads for the balance of the transportation cycle there.

Q. On the example that we have put in for illustrative purposes by agreement, a shipment that was destined for the dealer in Calhoun City that went partially by rail to the rail ramp at Jackson, Mississippi and then by Complete, I hand you a document that has been marked as Exhibit C-1-A. Is that illustrative of the type of document that would be prepared at the time that you deliver the vehicle to the railroad commonly called a waybill? A. Yes, it would.

Q. Is this typical of the type of thing that is prepared at that time? A. Yes.

Q. I see with reference to this particular exhibit that it shows the consignee down at the bottom as being the

towns. Does it ever actually show the actual dealer itself? A. Some do at some plants, yes.

Q. Are different forms used to accomplish the purposes here by different plants? A. Yes, they are. Basically I would say in all [38] instances the responsibility of the plant traffic manager is to have shipping documents in the hands of the highway carriers serving the railroad ramps we are using at the time the rail car arrives at that point.

Q. As you would visualize these documents and pursuant to your instructions, what would be your basic instructions to the traffic department of an assembly plant as to how to get this vehicle from the plant in Georgia to the dealer in Calhoun City? A. Our instructions to a plant would be to use the Jackson ramp, and we would give him the railroads from that particular ramp to the IC Railroad connection, using IC Railroad into Jackson and Complete Auto Transit to Calhoun City. This would be in the form of a two digit alpha code which is what we use now. We used numerics in the past. JT happens to be Jackson. Complete Auto Transit beyond. If you were to go to assembly plants throughout the country, you may see placards that are put into the windows of cars as they come off the line, indicating take it to the point to which we are making loads for, JT or Jackson, Mississippi, and Complete Auto Transit serving that point.

Q. So that your instructions would be this railway, and you would designate the railroad, would you not? A. Yes.

Q. You designate the railroad, one, two, or maybe three different railroads, in order to get it to the ramp in Jackson? A. That is correct.

[39] Q. And then you would designate Complete Auto to complete the transit? A. Yes. That would be our instructions to the assembly plants.

Q. As I understand your testimony, when the vehicle is delivered to the railroad, that your traffic people then immediately notify Complete concerning the vehicle that is on its way? A. Yes. The main points that they have to make the truck-away carrier or highway carrier serving the ramp know, that is, the unit involved, the destination or the dealer location and the rail car in which that particular unit was placed so that the carrier would know what units were on what rail cars so that he could prepare himself to make up his loads from the ramp site.

Q. Mr. Flanagan, I show you what has been marked as Exhibit C-1-D and I will ask you if that is illustrative of the type information that the traffic department would send to Complete? A. Yes. The majority of our plants are using this to convey the information that we have stipulated they must obey.

Q. Does that show the actual name and location of the dealer? A. Yes, it does.

Q. It identifies the car? A. Yes, it does.

Q. Identifies the rail car that it is coming in on? [40] A. Yes, and the date shipped from the . . .

Q. And you get this information to Complete as soon as you can after you once deliver it to the railroad? A. That is correct.

Q. This exhibit also, I believe, has considerable information about the car itself as to the attachments and how it was manufactured? A. Yes, it has a variety of uses, that particular form. Its primary design is to explode a dealer order at the plant into production language; therefore, you see a lot of symbols and codes indicating the different options and things of this nature to be placed on that car in accordance with the dealer order.

Q. All right, now. This information is sent to Complete. As I understand it, you already have a contract with Complete to transport any vehicles tendered to it, that is correct, isn't it? A. This is correct.

Q. And of course the common Carrier, the railroad, must take vehicles that are tendered to them for transportation? A. Yes, in accordance with their tariffs.

Q. And the transportation of Complete insofar as charges are concerned or tariffs, they charge in accordance with the tariffs they have on file? A. That is right.

Q. So that you have here a common carrier, an Interstate Commerce Commission common carrier with tariffs on [41] file and you have here an Interstate Commerce Commission contract carrier with tariffs on file as connecting carriers to complete this transportation? A. Yes.

Q. Is that correct? A. Yes. This puts us at the central office as well as the traffic managers in the field in a position to know what the total transportation cost is going to be to move that vehicle from the assembly plant to the dealer location.

Q. And at the time that you deliver this vehicle to the railroad, who are they instructed to deliver the vehicle to? A. They are instructed to deliver it to Complete Auto Transit as in the case of Jackson.

Q. In other words, in all shipments during the period of time here involved, that came to the ramp in Jackson, Mississippi, they were instructed to make all deliveries of vehicles directly to Complete Auto Transit? A. Yes, very definitely.

Q. So that from this point on then where you have delivered it to the railroad, you have your contractual relations with both parties, both carriers; you have delivered to the first carrier. The destination is your dealer at Calhoun City, Mississippi or any other dealer. What, if anything, does General Motors have to do with that shipment from that point on? A. Well, we hope we don't have anything to do, [42] unless the dealer reports some weeks later that he has not received his car. During this particular point in time, we weren't getting the reports

current, but we were relinquishing the care, custody and control of the vehicle and expected the carriers involved to perform their services in accordance with either the contracts or the tariffs that are on file so that the unit will be delivered within a reasonable time.

Q. So that insofar as General Motors is concerned, it has turned it over to certificated carriers for delivery to the dealer? A. That is correct.

Q. And you expect the traffic department and others to do such documentation as is necessary to get it to that destination? A. Yes.

Q. Is this generally done, Mr. Flanagan, throughout the nation? Is this a little operation or a big operation? A. The operation in Jackson, Mississippi is one of our, from a General Motors standpoint, one of our larger ones. I think volume-wise, it ranked 8th as far as the number of units put into a railhead for delivery to dealers within that railhead area. 90,000, I think, is a pretty steady figure for the last few years, per year, which on a working day we are talking about maybe 300 or 350, which have to be moved by the carrier through this facility in an expeditious manner, or you would have them locked up and they [43] would be using Penney's parking lot perhaps, if we didn't keep that flow moving through there.

Q. So that basically this is a transportation system of getting it from the plant to the dealer and it operates in a big way and General Motors has nothing to do with the care, custody or control of that vehicle from the time you deliver it to the railroad until the time it is delivered to the dealer, is that correct? A. That is correct. We expect the carriers involved to make delivery in accordance with the provisions of their tariffs and contracts. It is part of an overall cycle which ourselves as well as our competitors in the industry are interested in minimizing the time from the dealer order or customer order as the

case may be, dealer order to the time the unit is delivered. These are basically increments that involved the placement, the time the order is placed with the particular division, the time it reaches the assembly plant, the time it takes to assemble the vehicle, the time it takes to deliver that vehicle to the dealership. We are always striving to reduce that time in order to better serve our dealers.

Q. Mr. Flanagan, after the motor vehicle is turned over by the railroad to Complete, do you know what Complete does in the form of paper work other than just deliver it to the dealer? Do they send in and get paid? Do you know how they get paid? A. As I mentioned before, the assembly plant that is shipping the vehicles by rail carload, thence truck-away over Jackson, as is the case in all ramps, they know and have [44] on this dealer name and address file the amount of moneys that are in the Complete Auto Transit contracts from Jackson to that particular dealer location. This is accumulated at the time that our financial department at the assembly plant is notified that these units went to Jackson, Mississippi, these twelve, and they are all to be delivered by Complete Auto Transit. So those moneys are accumulated, and the carrier is virtually notified at the same time and paid very quickly the amounts due him, what we may call prepayment of the freight charge.

Q. So that it is conceivable that you would actually have paid Complete for a haul from Jackson to other locations even before they actually make the haul? A. It is possible. We are mechanized as much as possible to eliminate the manual effort involved in shipping virtually 25,000 vehicles a day to 13,500 U.S. dealerships of which 203 are in the State of Mississippi.

Q. So that Complete, as your other dealers would, in their regular cycling based on the information they received from you concerning the ultimate destination

of these vehicles that they were receiving from the railroad, would set up their billing procedures, etc. as well as their transporting procedures and bill it, do the paper work on the assumption that everything came in like it was supposed to? A. Yes.

Q. Mr. Flanagan, back when you finished the vehicle and put it on the railroad, when do you bill the dealer? A. The dealer is invoiced at that particular time [45] by the plant, that particular time being the time that it is being shipped from the assembly plant. There are certain allowances so far as free interest periods are concerned, a part of which is the anticipated transit time that it will take that vehicle to move from that particular assembly plant to that particular dealership. This varies with each and every assembly plant in its relationship to the dealerships.

Q. You mean the time varies? A. The time, yes. We don't, for example, charge the dealer interest for the time that the vehicle is in transit to him and for a stipulated time thereafter. One of our important functions, of course, is to reduce that time so that we won't have this money, this high inventory outstanding on our books. So the stress is constantly on keeping the vehicles moving in the most expeditious manner that we possibly can.

Q. My basic question here is, when you do deliver this to the railroad, at that moment you bill and mail to the dealer the bill for the purchase price of the vehicle? A. Yes.

Q. And the fact that he hasn't actually gotten it, it is still in transit to him, means that you don't charge him interest for the period that you estimate it takes to get the vehicle there? A. That is correct.

Q. And insofar as the charges are concerned for the freight charges, you have turned it over to the railroad

and you have, of course, a contract with Complete. They send you their statements. You pay them, and then you charge it back [46] to the dealer, a destination charge or freight charge to basically reimburse you for those expenses? A. Yes.

By Mr. Cannada: If the Court please, could we have a ten minute recess and let me see if there are any questions before we dismiss this witness? I think we are through.

By the Court: All right. (A short recess was taken, after which proceedings were resumed.)

By Mr. Cannada:

Q. Mr. Flanagan, when we took the recess, you were testifying concerning your desire to expedite this shipment from the assembly plant to the dealer. As far as General Motors is concerned, how do you consider the shipment or transportation from the beginning point or the assembly and the delivery point to the dealer? A. We consider in all cases . . .

Q. A little louder, please. A. We consider it in all cases a continuous movement from the assembly point to dealer location, be it in Alaska or be it in the States, the continental states here.

Q. Do you do that through certificated carriers by the Interstate Commerce Commission? A. Yes, we do.

Q. All the carriers that you use are carriers that have certificates from the Interstate Commerce Commission? A. Yes. Part of our job is to make certain that [47] we are satisfied or assured that they have proper certification.

Q. And it is your understanding that the rail shipper just turns it over to the trucker shipper to get it to the ultimate destination, the dealer? A. Yes.

Q. The carrier, the rail carrier turns it over to the trucking carrier for ultimate delivery to the dealer? A. Like in the case here of Jackson, yes.

Q. That is the way you have designed it from a General Motors standpoint? A. Correct.

By Mr. Cannada: No further questions.

Cross Examination

By Mr. Haddock:

Q. Mr. Flanagan, you stated that you, I believe I heard you say, that you conducted rate negotiations with the railroads? Are those rates negotiable? A. Yes, they are negotiable.

Q. Do you also negotiate the rates with Complete Auto Transit? A. Yes, sir.

Q. This storage yard located here in Jackson where the cars are removed from the railroad and placed on the yard, to whom does that belong? A. That is railroad custody. These are yards that they had to make available in order to have orderly transition from them to the beyond carrier.

[48] Q. Do you pay any fee for the storage of vehicles on those yards? A. No, only under certain circumstances and on certain types of vehicles. This is in our export operation where we have made arrangements with the railroad at a ramp location to store export units until their ships come in. Not on domestic traffic, though. By domestic I mean to U.S. dealerships.

Q. I would like to refer you to the exhibit marked "Car Label." I don't know what the exhibit number is. That is pasted on the vehicle identifying this vehicle. The dealer's name is Blackwell Chevrolet in Jackson, Mississippi? A. Yes, sir.

Q. Could you tell me exactly how this car is gotten to Blackwell from the rail car? A. From the rail car?

Q. Yes. A. It is unloaded by the railroad in accordance with the provisions of their tariff which includes the unloading, and then interchanged with Complete Auto

Transit in accordance with our instructions for delivery by Complete Auto Transit.

Q. Complete Auto Transit picks it up there. Even though it is here in Jackson, they pick it up and take it to Blackwell? A. Yes, that is correct.

Q. Let's kind of run down to get in mind exactly [49] how this operation works, the Plaintiff in this case, Complete Auto Transit, I believe is a corporation qualified to do business in the State of Mississippi; that they are hauling cars from Jackson to the dealers located in Mississippi and surrounding states, is that correct? A. That is correct, as well as hauling on a direct basis from certain of our relatively nearby plants.

Q. General Motors Corporation maintains an assembly plant in this instance in Atlanta, Georgia as an example, and they supply cars from this assembly plant to dealers in the southern states including Mississippi and surrounding states, is that correct? A. Yes, certain cars are assembled at that location. They basically are serving the southeastern states.

Q. When a dealer in Mississippi orders a car, they submit an order through a General Motors sales representative who gathers these orders for transmission to the proper plants, is that right? A. That is correct. In instances that is correct, yes.

Q. And these orders designate the models, the serial, the models, the colors, etc. that the dealer desires? A. That is correct.

Q. And these orders are assembled in a sales office and forwarded to the proper place for further action? A. That is correct.

Q. As soon as the body in the assembly plant is placed on the chassis, a sticker or whatever you call the [50] identifying instrument is placed on the windshield or in the car to identify that order and the car, is that

correct? A. Yes, sir. That could be at the end of the line if we are referring to the price label.

Q. Then upon completion of that unit, the unit is then shipped to the dealer who ordered that particular vehicle? A. That is correct.

Q. All right, sir. Now, to get down to the actual operation of General Motors or a General Motors Division, to whom the order has been submitted, as to the mechanics of the operation, the automobiles are loaded on a railroad car in this particular instance for delivery or for transportation to the Jackson, Mississippi ramp. A. Well, they are loaded for transportation to the dealer and an interchange is made at Jackson, Mississippi ramp, yes.

Q. All right, sir. At that time when they are loaded on the railroad car, an instrument is prepared which is marked Exhibit A, I think, and I will hand you a copy of it that I would like to refer to.

By the Court: Let's use the original exhibit.

By Mr. Haddock:

Q. It is Exhibit C-1-A. These cars are placed on the railroad car and this instrument is prepared to Southern Railroad System in this case or to the railroad or whoever is hauling this car by rail, is that correct? [51] A. Yes. It is prepared by the plants as a matter of convenience. It is a requirement really, the bill of lading, is to be executed by the carrier.

Q. That is correct. On this item, who is the shipper as designated hereon? A. It reads G. M. Assembly Division, General Motors Corpn., Lakewood Plant, Atlanta, Ga.

Q. All right, sir. The shipper is General Motors Assembly Division, General Motors Corpn., Atlanta, Georgia. Who is the consignee of this shipment? A. The consignee in fact?

Q. No, sir. The consignee as indicated on the document here. It says Consignee and Address. A. G. M. Assembly Division, General Motors Corporation, in care of Complete Auto Transit.

Q. All right. It is shipped to General Motors Division, General Motors Corporation, in care of Complete Auto Transit, Inc. where? A. Jackson, Mississippi.

Q. In Jackson, Mississippi. Now General Motors ships this automobile from Atlanta, Georgia to themselves here in Jackson, is that correct? A. No, not as a matter of fact.

Q. According to this document, the consignor, the shipper . . .

By Mr. Cannada: We object to him arguing with the witness. He asked a question. Give the witness an opportunity to answer it.

[52] By the Court: Let him finish his answer, but he may interrogate him.

By the Witness:

A. As a matter of fact, it is to Complete Auto Transit who has an agreement with us and who is domiciled here in Jackson, Mississippi.

Q. May I ask you, as reflected by this instrument, who is the consignee? A. If you want me to reread this again . . .

Q. Yes, sir. A. As I did before?

Q. Yes, sir. A. Reading from the block Consignee and Address, G. M. Assembly Division, General Motors Corporation in care of Complete Auto Transit.

Q. All right. Now, this document is prepared covering the transportation of this automobile from Atlanta to Jackson. Do you prepare another document or does anyone prepare another document covering the transportation from Jackson to the dealer? A. Yes, there is a waybill prepared by Complete Auto Transit in accordance with our instructions to them.

Q. I refer you to this document, C-1-E. Who is the shipper in this instrument? A. The form states, preprinted form states General Motors Corporation.

Q. Where? A. It further states Received by Complete Auto [53] Transit at—and then X'd out at Jackson.

Q. This instrument covers the transportation—this is a shipping document covering the transportation by Complete Auto Transit from Jackson, Mississippi and it is consigned to whom? A. Hawkins Chevrolet, Inc., Calhoun City, Mississippi.

Q. There are in fact two contracts for transportation in effect, is that correct, one with the railroad and one with Complete Auto Transit? A. In line with the rates, there are two contracts for transportation.

Q. And there are two shipping documents prepared, one to the railroad and one to Complete Auto Transit, or one by Complete Auto Transit to the dealer? A. Right. I think what we are saying is that there isn't a joint rate. It is a combination of locals in connection with a through routing as stipulated in ICC cases.

Q. Well, I think that you testified that the rates governing both movements were in accordance with . . . A. Are in two separate documents you might say, or tariffs, yes.

Q. Who receives these cars in Jackson, Mississippi for General Motors? A. Who receives them for General Motors?

Q. Yes. Who signs for the receipt of them? A. As far as we are concerned, Complete Auto Transit is receiving them in connection with the movement of that vehicle from the plant to the dealership.

[54] Q. They are authorized to receive these vehicles from General Motors here in Jackson? A. From the railroad, the ICG Railroad.

Q. Right. They are delegated the authority to sign or whatever they do to take over these automobiles from General Motors here in Jackson? A. From the ICG Railroad here in Jackson.

Q. Have you delegated any authority to anybody to sign for the receipt of these vehicles? A. No, we feel that we have arranged a through movement of the vehicle from the assembly plant to the dealership; therefore, if both carriers provide the services that they hold themselves out to provide, then that vehicle will be delivered to the dealer in a reasonable time. Anything that is signed between two carriers as far as, oh, let's say the protection of one carrier against the other, in claims if there is a vehicle received by let's say Complete Auto Transit here with a dented fender, I am sure they would want to have the other carrier, the railroad in this case, acknowledge at the time of receipt at the interchange point that the vehicle was damaged, but this varies, and we don't have a direct interest in that so long as they perform the services they hold themselves out to perform.

Q. All right. Why are two documents prepared covering two shipments when in fact, as you claim, there is only one through movement of it? A. Because there is no existing joint rate. There are two rates.

[55] Q. Are the rates the same covering the rail movement or based primarily on the same factors? A. No, they vary considerably depending upon what plant they are coming from such as California to Jackson versus St. Louis to Jackson.

Q. As a matter of fact, while these automobiles are in transit, in rail transit, to whom do those cars belong until they arrive here in Jackson, Mississippi? A. If we are asking when title passes on those vehicles?

Q. Yes, sir. A. I don't know. That seems to be a difficult question even for the most expertise. I don't

profess to be expertise in that regard, but I do know the vehicles are invoiced to the dealer prior to that time or at the time of shipment.

Q. Basically, though, if General Motors ships an item or anybody ships an item to themselves in another location, they retain title of it until it reaches that next location, is that not proper? A. If I want to take possession for some reason at another location such as if I met 40 vehicles through the port of New York and I want to hold them in a particular location, yes, I would say they are still in my possession, yes.

Q. And while they are in transit, they could—General Motors could, if they so desired, could divert that automobile to some other location? A. Without the request of the dealer?

[56] Q. Yes, sir. A. I kind of doubt it. If we have already invoiced that dealer, I think we would be sorta sticking our neck out. If that dealer were to request through the sales organization a diversion for one eason or another, we would honor that request from our sales department.

Q. But the car still belongs to you at that particular point? A. You are asking about passing of title?

Q. Yes, sir. A. Like I say, as a layman in this regard I know the car is invoiced at the plant when we ship it. I know we have an arrangement under agreement with the dealers that we will deliver that vehicle to their place of business and we will select the carriers and all, and we will process claims in case of damages to this material.

Q. Suppose that vehicle sustained damage while in transit on the railroad. Who would be responsible and to whom would they be responsible? A. Who would be responsible?

Q. For any damage? A. Perhaps if I give you an idea what happens in that regard, eventually it is delivered to the dealer. The dealer takes exception at that point, saying, "The right front fender was damaged at the time I received it." Under our agreement with them, he will notify General Motors. General Motors will then process the claim with the carrier for reimbursement.

[57] Q. He notifies General Motors of the damage? A. That is correct under our agreement with him.

Q. And then General Motors takes whatever action is necessary to correct the damage? A. Yes, an investigation is made. If it is found that the carrier is liable, the carrier will pay the claim.

Q. What happens when those cars are unloaded here in Jackson, physically what transpires?

By Mr. Cannada: If he knows.

By Mr. Haddock:

Q. If you know. Excuse me. A. It varies with connecting carriers you know, railroads and haul-away carriers at various ramps. I have not seen the operation out here. We drove by last night.

Q. You don't know whether anybody inspects the automobiles when they are unloaded or . . . A. I would assume at some point in time Complete Auto Transit would inspect to protect themselves from having a claim filed against them that it was a fault of the carrier.

Q. In order to establish where the damage was done, Complete should inspect it when they take the property over here in Jackson for their protection? A. Yes, from the standpoint of a carrier, that is good business, yes.

Q. I would certainly think so. How long do these cars as a general rule stay on the lot here in Jackson? A. I can't think of Jackson offhand, but I imagine [58] Jackson is very normal with the rest of them. I'd say we would have a day or two bank under normal circum-

stances at our ramp in Jackson. I think Jackson falls in this category.

Q. Are all the automobiles that you ship to Jackson designated to some particular dealer? A. Yes.

By Mr. Haddock: I believe that is all.

By the Court: Any redirect?

Redirect Examination

By Mr. Cannada:

Q. Mr. Flanagan, referring back to this document which has been identified as Exhibit C-1-A, as a matter of fact down at the bottom it shows consignee and it lists a list of cities. Are those actually the dealers to which these individual cars are assigned? A. Yes, that is correct.

Q. So they are called the consignee in the document? A. On this form, yes.

Q. And those are the particular dealers and identify the vehicles by shippers number; that is really the serial number for the vehicle that is going to that particular dealer, is that correct? A. Yes. That is correct.

Q. I believe you testified that there are two rates [59] here, one for rail and one by the truck. They have separate rates filed with the Interstate Commerce Commission, is that correct? A. That is correct, yes.

Q. And they don't have through rates on file with the Interstate Commerce Commission, is that correct? A. I think the point there is that they don't have joint rates.

Q. Joint rates. They don't have joint rates? A. Yes. I feel a through rate is a combination of separately established rates in which there is a through or continuous movement.

Q. So you can look at their rates and determine what the charges will be to get it from the assembly

plant to the dealer, but they are separate charges. They are not joint charges? A. That is correct.

Q. But they are through charges, and therefore they have to be billed separately even though there is a through rate. The billing comes in two forms because they don't have a joint rate filed with the Interstate Commerce Commission? A. That is correct.

By Mr. Cannada: No other questions.

By the Court: You may be excused.

(Witness Excused)

[60] By Mr. Cannada: We call Mr. Walter Hansz.

MR. WALTER HANSZ,

the next witness called by Complainant, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cannada:

Q. Mr. Hansz, would you give your name to the reporter, please, sir? A. I am Walter Hansz (H-a-n-s-z).

Q. Where do you live, Mr. Hansz? A. I live in Detroit, Michigan. The address is 14300 Artesian.

Q. For whom do you work? A. I work for Complete Auto Transit, Inc.

Q. That is the complainant in this case? A. Yes.

Q. What title or position do you hold with that company? A. I am Vice President in charge of administration and also Assistant Secretary and Assistant Treasurer.

Q. How long have you been with Complete? A. I have been with Complete 11 years.

Q. You were with them during the entire time involved in this particular litigation? A. Yes, I was.

Q. Have you been familiar with their operations for the last 11 years? [61] A. Yes, I am familiar with their operations.

Q. Are you familiar with their operations in Mississippi? A. Yes, I am.

Q. Mr. Hansz, what type of business is Complete in? A. Complete is in the business of transporting vehicles, both passenger and commercial motor vehicles. We haul these vehicles exclusively for General Motors under a contract. We are a contract carrier. We have operating rights that have been authorized by the Interstate Commerce Commission. Our authority touches in some way all of the states except Hawaii and Alaska, but our active operation at the present time takes us in about 30 states. We carry roughly a million cars a year at our present rate, and we have for the last few years, which generates total revenues of about $55,000,000. We have operations, specific operations, in the following points. We serve a General Motors plant in Atlanta, Georgia where we receive cars directly from the plant to be transported. At Atlanta, Georgia also we receive cars from railroads who bring the cars in from other outside plants and take them off their multi-level rail cars and we receive them from them and then carry them on to the dealer destination in accordance with instructions that we have received from General Motors.

We have a terminal at Norwood, Ohio where we receive cars from the Norwood, Ohio General Motors plant for delivery of these motor vehicles directly to dealers. At Norwood also we receive cars from the railroad ramp. At [62] Doraville, Georgia we receive cars from the Doraville General Motors plant. At St. Louis, Missouri we also serve a plant there. At Willow Run, Michigan we serve a plant. Then we also serve two railheads or rail ramps which have no attendant plants, and that is Shreveport, Louisiana and Jackson, Mississippi. In these two locations we receive cars from railroads. We continue the interstate haul from that point on to the dealer destination.

Q. Mr. Hansz, I understood you to say you have certificates from the Interstate Commerce Commission under which all of these operations are conducted? A. Yes, sir.

Q. How long have you been conducting this kind of business? A. Complete has been in business for over 30 years and over those years we have picked up additional business. General Motors business fluctuates, of course. They open and close plants and they have new railheads. At one time we served railheads in Florida and one in Dallas, Texas. After a while we were no longer required to serve there and we closed up our operation there. We have had a fairly fluctuating service record with General Motors. Of course we have just the one contract. We serve General Motors exclusively.

Q. And they are all under your certificates from the Interstate Commerce Commission? A. That is correct.

Q. Do you have any intrastate certificates in the [63] State of Mississippi? A. No, we don't have any intrastate certificates. We have a permit to operate in Jackson, but it is to operate as an interstate carrier.

Q. This is a copy of this permit attached to Exhibit C-2, is it not, Mr. Hansz? (Document shown to witness.) A. Yes.

Q. So I understand you to say you have Interstate Commerce Commission operating rights through the State of Mississippi and in the State of Mississippi pursuant to the Mississippi statutes, but no intrastate rights from the Mississippi Public Service Commission? A. That is correct. We have never sought intrastate rights. It wasn't necessary to do so, because there is no General Motors plant here that General Motors has requested us to serve.

Q. Now in connection with the operations, and we will address them to the operations here in Jackson, Mis-

sissippi, how long have you operated here in Jackson, Mississippi? A. I believe the present operation started in 1960 or . . .

Q. 1960 what? A. Somewhere around 1960 as I recall.

Q. 1960, in that general area? A. Yes.

[64] Q. Prior to that time were you transporting vehicles from plants into Mississippi by truck? A. Yes.

Q. And have you continued to transport vehicles all the way from plants outside of the State of Mississippi into Mississippi by truck? A. Yes, passenger cars built at Doraville are in some cases trucked into Mississippi, and both passenger and commercial vehicles from Atlanta, Georgia. Some are shipped into Mississippi, and the cars that are built at Norwood are different from the cars that are built at Doraville, so we have occasion to ship some Norwood cars into Mississippi.

Q. By ship you mean you actually transport them by your truck all the way from the assembly plant into the state? A. That is right. Our equipment consists of a tractor and a semi-trailer which are specifically designed to haul passenger cars and commercial vehicles. We can carry five and seven, depending on the size of the vehicle, the shape, and sometimes pick-up trucks, panel trucks, vans having a much more bulky shape. They don't fit in as well as passenger cars, and maybe you can only carry five, whereas with passenger cars, you can carry seven.

Q. And this is all done pursuant to your authority from the Interstate Commerce Commission and you are paid for it in accordance with the tariff on file with the Interstate Commerce Commission? Is that correct? A. Yes, we have tariffs for each of the locations [65] where we operate. These tariffs specifically spell out the exact amount of money that we are to receive for each car

that we move from point of origin complete to the destination which is always the dealer. Our service is to the dealer's door.

Q. And this would be true of any shipment that you made during this period of time involved in this case? A. That is right.

Q. You say you started around 1960. Is that because the railroad put a ramp here? Why did you start this in Jackson? A. General Motors is always seeking the lowest cost form of transportation, and they determined that from certain of their assembly plants they could ship cars into Jackson, Mississippi by rail at a lower rate because as you know a multi-level rail car can carry 10 to 15 automobiles. This rail car moving over rail gives them a lower cost, so the railroads, although they can perform this service from rail terminal to rail terminal, they are not flexible enough to take the car to the dealer. So General Motors Corporation wishes to continue giving this service to the dealers without having the dealer come to the rail ramp to pick up his car. They employ us to take the car directly to the dealer, door to door. I suppose that one specific reason they have for doing this is that they want to be sure that the car is in perfect, salable condition at the time the dealer gets it at his door. At the time the dealer gets it at the door, and our employee delivers it, they make an [66] inspection. If the car is okay, they sign. If there are any damages, they note the damages. Our driver will look at the damages and will agree, and he will sign.

Q. Now basically my original question here was that you started this operation when the railroad put a ramp in Jackson, Mississippi which you understand was around 1960, the early part of 1960, is that correct? A. Yes.

Q. And you have been operating continuously since that time? A. Yes.

Q. Had you ever paid this particular five percent sales tax? A. No. When the auditors came into the office and asked to see the freight or the revenue documents and we asked why, we were kind of surprised because we hadn't known that there was a sales tax. In all the states that we operate, we do not pay in any case a sales tax on freight revenue based on a freight document. So this was highly unusual for us.

Q. And you have the same type of operation in other states, and you have never been confronted with this problem? A. Yes. The states that I have already enumerated in my testimony.

Q. So that this came as a surprise to you? A. Yes.

Q. Did you cooperate with them and give them the [67] information they requested? A. Yes, indeed. We wrote and asked for a copy of the specific law. In fact, I wrote for several copies. I gave one copy to our auditors. I gave one copy to the General Motors logistics office so that we could better understand what we were being assessed for and what we were probably going to pay.

Q. Mr. Hansz, back to your specific operation here in Jackson, during the period of time here involved, you have heard the testimony of Mr. Flanagan. To the extent that it applies to your understanding as to how Complete functions, are you in accord with what he has said? A. Yes.

Q. Did you take any exception to anything he said? A. No, I can't take any exception.

Q. Now with reference to the mechanics of how it works, what facilities does Complete have in Jackson, Mississippi to take possession of these vehicles from the railroad? A. We have some space that we rent from the railroad company, pay rent for the space that we use. We have a small garage on it where we do just a minimum of servicing. We don't do heavy repairs. We send

all our heavy repairs out to local garages, but we do have some minor things, maybe greasing, changing lights, things like that that may be done very quickly and it would be foolish to tie up a vehicle going out to a repair garage and back. We have a small office where we have telephone facilities and keep our [68] typewriters and other office equipment and where our supervisors do whatever paper work they have to do and the drivers can come in and do whatever paper work they have to do and from which they are dispatched.

Q. Do I understand you to say these facilities were actually leased from the railroad out at the ramp site? A. Yes.

Q. So that you are located right there on the railroad property? A. That is right. We have no other sites in Hinds County, Mississippi or Jackson.

Q. And this is right on the railroad property at the railroad ramp? A. That is correct.

Q. Now let's take this car that we have used as an illustration that came from the plant in Georgia coming by Southern, by a different railroad, but delivered by Illinois Central to you in Jackson. What are the mechanics? How does this work? A. The plant in Georgia ships these cars on a prepaid basis. That means that the car isn't shipped out collect so that when the dealer gets it, he has to pay. General Motors will pay it. They set up a listing of cars after it is determined how the cars each day—the cars come out of the plant and before they come out of the plant, they know where these cars are going. They must know because they can tell us. They set aside a certain group that is to go on rail and a certain group that go by [69] motor carrier. Those that go by rail, they develop certain documentation. I don't know the specifics of what that is because that is the railroad's business, but they give them instructions

to deliver—take the car to let us say Jackson, Mississippi, and they give all this information to the railroad at the plant site. The railroad then relays this information on to their representative at the Jackson, Mississippi ramp, rail ramp, so that he knows what cars to expect. He knows what rail cars are coming in, and he knows what automobiles are on those rail cars. At the same time they notify the automobile carrier which is Complete that they can expect to receive at the Jackson, Mississippi ramp certain automobiles. They give them a list. At that time to my knowledge, I believe it is at that time, they set up the liability for the freight charges, both to the rail and to the automobile carrier and put that in their accounting process. When the rail car arrives at Jackson, Mississippi, the railroad's representative or employee has his list, and . . .

Q. Prior to the time the railroad cars arrive, has Complete—would Complete normally have the information from General Motors? A. Yes. That information comes to us, and at the time of this period of tax we are considering, it went to our St. Louis office, and the St. Louis office relayed it on to our manager at Jackson, Mississippi, so that he had a complete list of the cars that were coming, who the dealer was, where they were going, and how much money he was going [70] to get for it, so that with this information he was actually able to get some of his paper work ready. He could get some of his road—the driver has to have a road copy of a waybill. We don't use the waybill to bill General Motors. This is all done by lists, but the bill has to be made out so that the driver can show authority to proceed on the road in case a Mississippi State Trooper stops him and asks, "What is your authority to operate?" He also has to have a copy of the bill to get a receipt from the dealer. So we can get some of those ready. We can get practically

all of that ready except that we don't know who the driver is going to be or what the tractor number or the trailer is going to be. But he can get that ready, and this improves the efficiency in delivering the car.

Q. In other words, even before the vehicles have arrived on the railroad, you have already gotten instructions from General Motors that these vehicles are on the way by the railroad? A. Right.

Q. And the dealer that they are going to by serial number? A. That is correct.

Q. So that you can be setting up loads, so to speak, of seven or eight cars that you take in a general area and have that all arranged by the time the cars ever get there? A. We can—there is just a slight correction to that. We can get the paper work ready. We don't definitely make up a full load, because we wait to see how these rail [71] cars are going to come in. Sometimes they are delayed. Sometimes they don't come in on time when they are supposed to. Maybe one will come before the other. Maybe the one coming from Kansas City will arrive before the one from Atlanta, and that will bring in a whole set of new cars. We have the paper work, but we don't know about the timing. But as soon as we know they are there, then we can start to make the loads.

Q. The vehicles come in by rail. Who unloads them? A. The railroad unloads them.

Q. Does the railroad deliver them directly to Complete? A. Here is actually what happens. There is quite a bit of activity in that yard. There are about 300 cars a day coming in. We don't attempt to make up loads just the minute the car comes in. We give the railroad time to get these cars off of their multi-level—the automobiles off their multi-level loading and get them spaced out in the yard. We have what we call dispatch

time. That is the time in which we assemble our drivers and men. We know what we've got. We give them the loads to take out. This is at about 5:00 o'clock in the morning in Jackson, I think. Different places have different times. We figure that we have accepted that car at 5:00 in the morning when we open the dispatch gate. Now when the cars are unloaded from the multi-level rail car, the automobiles, vehicles let's say because here are a lot of passenger cars and trucks, pick-up trucks, panels and so on—I presume—I don't presume—I know [72] that the representative of the railroad ticks off the cars to be sure that everything he is told is coming is there, and that none are missing.

When they get down in the yard ready for dispatch, then our representative ticks off the cars to be sure that they are all there so that we haven't lost one. We don't sign a document saying we received car number so and so and give it to the railroad. They have checked off their cars and they are satisfied. We have checked off the cars and we are satisfied. So then we begin to make up our loads and get them loaded and on their way. In this procedure our employees will look the cars over and if they find a car with damage, whatever damaged cars there are, they will get ahold of the railroad representative and ask him to look at the damage, and they will ask him to sign an acknowledgement of damage, that we got that car from the railroad damaged, and then we will sign that damage paper, the paper that describes the damage. We do that because we know that when we get that car to the dealer, the dealer will see it and he will make all the notations. He will ask our employee to certify that that was damaged before he got it. He doesn't care who he is going to get this back from. He knows that either we damaged it or the railroad, so then he has a copy of this, and with that copy he makes his

claim for damages, and he is required to send that claim to General Motors. General Motors will have copies—will approach us on the damage, and we will have to show either that it is our damage or it is the railroad's. If it is our damage, we will [73] process it and we will pay General Motors for the damage. If it isn't ours, we will put a refusal slip on it. We will say that because we have a receipt from the railroad showing that we received the car in a damaged condition, this claim should go back to the railroad. But the original claim in most cases comes to us because we have the responsibility of delivering the car to the dealer, the final consignee in the interstate movement.

Q. Mr. Hansz, insofar as Complete Auto is concerned in its operations in the City of Jackson during the period of time involved, do you have any contact with anybody in connection with the transfer of these motor vehicles from the rail ramp that you have described here, turning them over from the railroad to Complete, other than with the railroad representatives themselves? A. No.

Q. And they are delivered directly to you by the railroad representative? A. That is right.

Q. No one makes inspection of any kind except the inspection by the railroad or Complete to see if there is any damage so as to see which one of the carriers will be responsible for the . . . A. We make inspection . . .

Q. Let me finish. To see which one of the carriers would be responsible for the damage, is that correct? A. We make inspection to protect ourselves.

Q. The inspection is to determine, if any, the [74] the responsibility of the respective carrier for the damage to the vehicle, is that correct? A. Yes.

Q. So that if as a matter of fact there is no damage, there is nothing signed that you give to the railroad or

the railroad gives to you as between the carriers? A. No.

Q. The vehicle is just delivered by one carrier to the other, is that correct? A. Yes.

Q. I hand you a carbon copy of a document here of Complete Auto which shows it signed by Illinois Central and Complete. Do you recognize what that is? A. Well, it says . . .

Q. Is that the type of document that is executed if there are damages? A. It shows exception to the car, that the chrome molding has been torn off.

By Mr. Cannada: We would like to offer this as an exhibit as an illustration of the type of document that is signed by Complete and the Railroad when there is damage to a vehicle, if the Court please.

By the Court: Let it be marked and entered.

(The document introduced by Complainant on direct examination of the witness Hansz was marked and received in evidence as Exhibit C-4 and is as follows:)

Exhibit C-4

COMPLETE AUTO TRANSIT, INC.
P. O. Box 4943 · Fondren Station
JACKSON, MISSISSIPPI, 39216

Rail Car No. RTTX150192 11/6 Model 1X69D4 Serial No. L137257

Consignee CLIFF COLBERT CHEV OLDS CO C.A.T. W/B 388119

City GRENADA State MS

Date and Time received by Rail 11/18/73 By C.A.T. 11/20/73

Exception: CHROME MOULDING IS OFF THE RIGHT REAR DOOR

EXHIBIT

JUN 12 1974

MARY BURKEIT Reporter

Inspected by: _____ Complete Auto Transit

Acknowledged by: _____ Illinois Central Railroad

By Mr. Cannada:

Q. Mr. Hansz, this document which has now been identified as Exhibit C-4 refers to a car that was shipped to Grenada, Mississippi, is that right? A. Yes, to Cliff Colbert Chevrolet-Olds Company.

Q. It shows on there an exception that the chrome molding is off the right rear door? A. That is what it says.

Q. And that is signed by . . . A. B. Collins who is our employee.

Q. For Complete Auto, and it is acknowledged by Illinois Central Railroad by B. C. James. A. I don't know who that signature is but it says Illinois Central Railroad below his name.

Q. But this is the type of thing that you do, and the only time you use any written instrument is between you and the rail carrier if there is some damage to a vehicle? A. That is right.

Q. Now this document which has been identified as Exhibit C-1-D, and I believe you heard Mr. Flanagan testify that it is illustrative of the type of information that is sent by General Motors to you when they ship the car, is that correct? A. Yes.

Q. This is the type of information that you have from which you begin making your plans to pick up this car and take it to the dealer? A. Yes.

[76] Q. I see a stamp on the back side of it. It is stamped received. Is this for your own internal purposes or is this given to the railroad, or what is the purpose of that? A. No, that is our own document for our own internal checking.

Q. In other words, you don't turn this document over to the railroad? A. No.

Q. Mr. Hansz, when your men pick these vehicles up as you have described, the railroad checks them out

and turns them over to your man and you load them. Then what happens to the vehicles? A. Once a load is made up, the driver has all of his documents, and then he drives the vehicles to the dealer.

Q. And delivers them at the dealer? A. At the dealer's door.

Q. You have heard the description here by Mr. Flanagan that some are all in Mississippi and some partially in Mississippi and partially out? A. That is right.

Q. And some go all the way out of the state, I guess, some loads? A. Yes, there might be a few loads that don't even have a drop in Mississippi, but most of them would have a first drop in Mississippi and a few cars out near in other states.

Q. And in connection with the billing, you have [77] a contract on file with the Interstate Commerce Commission showing the tariff, the rates you will charge for this service, is that correct? A. That is correct.

Q. And when do you send in your bill for your tariff? To whom is it sent? A. We don't really send anything in. In some cases—there are a number of ways of doing this, and each of the General Motors plants has a different plan. Some of them will make an IBM listing of the cars and will make the complete pricing which they will use in their accounting procedures, and they will send a check to us for that amount. In other cases we will make out an invoice. It is really more of advice than an invoice, listing the number of automobiles received from certain cars in certain places. We will send that to them and we are paid. Usually we do that when the money isn't forthcoming in the normal way from General Motors, but usually it comes without our sending it in.

Q. In other words, they know the cars have been sent to you for transportation and within the contract period—I believe you said seven days—they usually just

pay you for it as they would any carrier? A. Yes. Of course all carriers are involved in a reporting procedure to General Motors as to when they deliver the cars. We have to report in daily each car as we have delivered it.

Q. Mr. Hansz, I understand that Complete Auto [78] Transit is a Michigan corporation, that is correct, isn't it? A. Yes, it is incorporated in Michigan.

Q. When did you pay the tax that is the subject of this lawsuit? Have you got your records there? A. I brought a photocopy of the checks with me. The first check was for the period August 1st, '68 through July 31, '71.

Q. In what amount? A. In the amount of $124,-384.49.

Q. When did you pay that? A. That was paid on July 13, 1972. The reason why there is a delay there is that after we received the notice and the demand for tax, we asked for a hearing before the Commission, and we did get it, and the assessment was upheld. Then after that procedure was all completed, we sent in our check. That check includes interest from the period ending July 31st. In fact, it includes interest going way back to '68 and '69; each year had a separate rate on it.

Q. The amount that you paid on July . . . A. July 13th, 1972.

Q. You paid how much? A. $124,384.49.

Q. And what other payments did you make? A. A second audit, of course, was made for the period August 1, '71 through July 31, '72, and that total amount was $42,990.89 which included tax and interest.

Q. When did you pay that? [79] A. That was paid on February 1, 1973.

Q. Mr. Hansz, have you been reimbursed for those taxes in any way? A. No.

Q. Who bore the complete burden of the tax? A. We did.

Q. Was there anything in your tariffs on file with the Interstate Commerce Commission or any arrangements with General Motors or anyone else that they would reimburse you for this cost? A. No.

Q. Had it been calculated in determining the tariff that you put in your rates? A. We never placed the five percent on any charges to General Motors for this.

Q. In computing the charges that you had on file the five percent was not included in those charges? A. No. We could only charge what was in the tariff.

Q. And you have never passed this on, this tax, to anyone either directly or indirectly? A. No.

Q. You have not collected it from anyone? A. No.

Q. And if you are not successful in getting this back from the State Tax Commission, then you will have borne the full burden of this tax yourself, Complete Auto? A. That is right.

[80] By the Court: May I have the amounts of those? A. And the dates?

By the Witness: The July 13, 1972 check was $124,-384.49. The February 1st, 1973 check was $42,990.89. I would like to add something to the last. We negotiate tariff rates with General Motors because we are a contract carrier, and at that time we review our costs and determine a revenue rate that will cover our costs and give us a fair margin of profit. It may be that when it is finally determined by this court case that this is going to be an extra cost, we may get this recognized as part of our costs.

By Mr. Cannada:

Q. That would be for future operations? A. That is right.

Q. If it was a cost, but insofar as this tax is concerned, then, you have borne it and paid for it? A. That is right. The period of the tax, the period of the activity is gone.

Q. Now, Mr. Hansz, I believe you have prepared a schedule of taxes that you have paid the State of Mississippi. Would you state to the Court what corporate franchise taxes complete paid to the State of Mississippi for the years involved here, that is, the calendar year '68 through the calendar year '72? A. Going back to 1968, do you want me to read that?

Q. Yes, if you would. A. 1968 . . .

[81] By Mr. Haddock: I object to this, Your Honor as being irrelevant. We are not concerned of all these other taxes. Again we will agree that he has paid taxes, whatever he was supposed to pay.

By the Court: I sustain the objection.

By Mr. Cannada: May I make my record, if the Court please? I think this is significant. We went through this in the Dunn Brothers. I simply did this in the Dunn Brothers case, just saying we agreed that we paid all lawful taxes, and our Supreme Court said that is not sufficient. You should show the taxes that you have paid.

By the Court: The Supreme Court said that had a bearing?

By Mr. Cannada: Yes, sir. As I started to say a minute ago, I agree with you. I don't think it has any bearing at all, but there is a decision which indicates that what taxes you have paid may have a bearing, and that is what I think is important.

By Mr. Haddock: That is a question that I don't think is involved here that was present in the Dunn Brothers case. That involved a question of interstate commerce in bearing a fair proportionate share of local taxes for the use and privilege of state government. We will

agree that they have paid [82] whatever taxes are required of them.

By Mr. Cannada: It would only take a moment, if the Court please, and if you would permit, I would like to put this in.

By the Court: You may state what you would have proved.

By Mr. Cannada: May I make my record by cross-examining the witness?

By the Court: You are filling up the record just exactly the same way as if we had let it in, counsel.

By Mr. Cannada: It is essential, if the Court please, that we get this testimony, not essential, but I think it is important that we get this information in.

By the Court: If you have an exhibit, why don't you just present that?

By Mr. Cannada: May I then offer as an exhibit to the testimony of this witness this schedule showing taxes paid by Complete Auto to the State of Mississippi.

By the Court: It may be marked for identification.

(The document introduced by Complainant on direct examination of the witness Hansz was marked for identification as Exhibit C-5 and is as follows:)

Exhibit C-5

SCHEDULE OF TAXES PAID BY
COMPLETE AUTO TRANSIT TO THE STATE OF MISSISSIPPI

Corporate Franchise Taxes

1968	$1,170.00
1969	$1,425.00
1970	$1,567.50
1971	$1,297.50
1972	$1,670.00
	$7,130.00 Total

Corporate Income Taxes

1968	$5,924.42
1969	$2,683.30
1970	$(941.06)
1971	$5,656.49
1972	$1,884.86
	$15,208.01 Total

Ad Valorem Taxes Paid to the State on Vehicles

1968	$4,771.34
1969	$4,601.50
1970	$5,238.64
1971	$4,208.49
1972	$16,802.77
	$35,622.74 Total

Fees Paid for License Plates for Vehicles

1968	$41,915.90
1969	$45,820.50
1970	$46,702.00
1971	$42,587.25
1972	$50,933.70
	$227,959.35 Total

In addition to the foregoing Complete Auto pays ad valorem taxes to the City of Jackson and the County of Hinds on the personal property such as office furniture, etc., at its rented facilities here in the City of Jackson. Complete also pays unemployment taxes and other taxes of similar nature.

[83] By Mr. Cannada: May I further state for the record that if permitted to do so, we would show by this witness that these taxes were actually paid by Complete to the State of Mississippi; that in addition to that, as shown on the bottom, additional ad valorem taxes were paid to the County of Hinds and to the City of Jackson, and the basis on which the tax was determined for the franchise tax and the income taxes, which bases included a factor that took into consideration the gross receipts received by this carrier for the very hauls that are attempted to be taxed in this lawsuit.

That is all of this witness.

By the Court: Since it is near the lunch hour, we will recess until 1:30 P.M. (Proceedings were recessed at 10 minutes of 12:00 for lunch, and were resumed at 1:30 P.M.)

Cross Examination

By Mr. Haddock:

Q. Mr. Hansz, I want to clear up one particular point. I believe you testified this morning that you did not have an intrastate permit in the State of Mississippi, is that correct? A. Yes, sir.

Q. Is it true that the reason you don't is because you never applied for one nor did you think that you needed one? A. We didn't need one.

[84] Q. It is your impression that you don't need one, and you therefore have never applied for one? A. That is right.

Q. To clear up one or two little matters dealing with the responsibilities and to whom the responsibility is to, so far as property that you are transporting is concerned, if the damage is done to a vehicle in transit from the plant, from the plant to the loading ramp, that is the responsibility of the railroad? A. Yes.

Q. From the railroad after it is turned over to you, from the time it is turned over to you in Jackson, Mississippi to the dealer, the responsibility is yours? A. And this is the way that works out. When the dealer has the damaged car, he makes out a claim and he sends it to General Motors and the claim comes to us because we were the delivering carrier. Then when it comes to us, we check our records and see that we have a clear receipt from the rail as to that damage. We have a notation from—on the damage and the railroad acknowledged it, so then we send that claim back. We deny that claim and send it back to General Motors and say, "We are not responsible. Apparently the railroad is." Then we are through with it.

Q. The responsibility for damage while you have the car in your custody is to General Motors? A. General Motors presents the claim and we pay General Motors.

Q. Do you know whether the same is true when the [85] railroad has custody? A. I don't know the railroad's business. I assume it is handled the same way.

Q. Just to clear up a matter as far as the mechanics is concerned, regarding the bill of lading for the transportation of the automobile, how do you go about getting the automobile in Jackson, Mississippi? A. Physically, when the railroad brings their rail car in, they unload the rail car and they place these cars on their facility that is on their property. The property is divided up into two parts. We have a small part which is where we have our office and our garage and our vehicles and our loading dock. When they unload the car, they place it on their property and it is still theirs. At 5:00 o'clock in the morning when we start dispatching cars, then our employees go over and get the cars that they need to make up the loads. At that time we take possession of the car.

Q. How do you do this? Do you just go out and take it physically? A. That is right. We just take it.

Q. Is there any paper transaction involved? A. Not between us and the railroad, no.

Q. I refer you to this exhibit, please, sir. That indicates that that car is shipped to Jackson. It says the consignee is General Motors Corporation care of Complete Auto Transit at Jackson, Mississippi. Is that not right? A. It says in one place consignee General Motors Assembly Division, and then down below it says consignee [86] England, Arkansas; Little Rock, Arkansas; Pocahontas, Arkansas; . . .

Q The eventual consignee is the latter part? A. That is the consignee to us.

Q. The consignee as far as that document is concerned —it was shipped from General Motors to General Motors here in Jackson in care of your plant or in care of your location? A. That is what it says here.

Q. Do you have a man here by the name of Ace Lauceman or something? On your lot? A. I don't know. I don't recognize that name.

Q. What is the man's name that operates your lot, or operates the lot for you out here at your . . . A. Bob Schanauer.

Q. Does he do anything with these documents to show an acceptance on your part from General Motors here in Jackson? A. No, not that I know of.

Q. Are you acquainted with a stamp that he puts on? A. Yes.

Q. Are you familiar with what that stamp says? A. Ah, it says received—something—received for General Motors, Complete Auto Transit, and then he signs it, you know.

Q. This is the stamp? (Document shown to witness.) A. That is right. Received.

Q. It says, "Received General Motors Corp."? A. Yes.

[87] By the Court: What is the exhibit number on the other side?

By the Witness: C-1-D.

By Mr. Haddock:

Q. It says, "Received General Motors Corp. Chevrolet Motor Divison" with the date, and then has below that, "Complete Auto Transit, Inc. By A. Schanauer." A. A. Schanauer.

Q. Who is your employee? A. Yes.

Q. This indicates that when he puts this on here that he is receiving this automobile from General Motors? A. Well, it is our own—it is for our own record and our own purposes. It says Chevrolet Motor Division. That indicates the stamp is very, very old because somewhere along the line four or five years ago, five years ago everything was shipped in the name of General Motors Logistics Divison, General Motors, and not—Chevrolet wasn't separate. But this is an old stamp that we use for our own convenience to indicate that we have processed the car. It is one of the things we use.

Q. When you get this car here in Jackson, you then make up a bill of lading or waybill or whatever? A. We call it a waybill.

Q. A waybill, from Jackson to the dealer? A. Correct.

Q. On which you itemize the cost of the transportation from this point to the dealer? [88] A. Mostly that bill is used to show the driver—give the driver the route, give him a copy to authorize his traveling on the road with that cargo, and to get a receipt from the dealer and to leave a receipt from the dealer. Actually we don't

use a copy of that to bill General Motors with, so there wouldn't be any reason for the amount of money being on it.

Q. Now, the payment for these transportation charges —I don't know—you may not know about the railroad's handling of them, but so far as your charges are concerned, you bill General Motors for your part of the transportation? A. Most of the time we don't have to bill. They make IBM lists at the time that they ship, and these go on to their accounting department and they are all priced. They have the rates right in a computer and they are priced, listed and totaled and they send us a check. They send us one of those lists with a remittance advice, so we don't have to bill them. Now in some cases, they make mistakes, or we think they make a mistake, so then we will issue a due bill or a credit, or some plants that we ordinarily don't get many cars from and that we are not familiar with, they have a little different procedure, they might not send us a bill, and we will sit and wait for it and nothing is forthcoming, so we finally will check with them or maybe we won't check with them. We will make out our own invoice and send it in and try to push them for payment. But this is a very small part of our collection procedure.

[89] Q. At any rate, you look to General Motors for the payment of the transportation costs from Jackson to the dealer? A. That is right.

Q. In no case do you ever bill the railroad for any part of these transportation charges? A. No.

Q. I believe that is all.

By the Court: Any redirect?

By Mr. Cannada: We have no further questions.

By the Court: You may be excused.

(Witness Excused)

By the Court: Who do you have?

By Mr. Cannada: We rest.

(Complainants Rest)

By Mr. Haddock: If Your Honor will indulge us five minutes, we may rest.

By the Court: Take ten minutes. (A short recess was taken after which proceedings were resumed.)

By Mr. Haddock: Your Honor, we will rest our case at this time.

[90] (Defendant Rests)

By the Court: Do you have any rebuttal?

By Mr. Cannada: No, we have no rebuttal.

By the Court: All right. You gentlemen have indicated that you want to file briefs in this cause and that you will submit simultaneous briefs. That is my understanding. That is fine with the Court. Thank you very much.

(Proceedings were concluded at 2:00 P.M.)

(Certificate omitted in printing)

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title omitted in printing)

OPINION OF THE COURT

(Filed August 5, 1974)

The facts in this case are not in dispute. The Court herewith uses the succinct statement of the Defendant as to the statement of facts. The Complainant, Complete Auto Transit, Inc., is a Michigan corporation, licensed by the Mississippi Public Service Commission to haul motor vehicles in Mississippi. The Complainant is engaged in the business of hauling motor vehicles for General Motors Corporation. In the case at hand, General Motors Corporation shipped the vehicles via rail from various assembly plants located outside the State of Mississippi to a railread ramp located in Jackson, Mississippi. At this point the vehicles are placed on a lot awaiting further shipment by the petitioner to various General Motors dealers in the state of Mississippi. The vehicles are shipped under a uniform straight bill of lading prepared by the manufacturer, General Motors Corporation, with General Motors Corporation as consignee, in care of Complete Auto Transit Corporation at Jackson, Mississippi, for further shipment to the dealers. A separate bill of lading is prepared for the shipment of the vehicles by Complete from General Motors Corporation in Jackson, Mississippi, to the various dealers in the state. It is only the charges for hauling the cars under the bills of lading from General Motors, Jackson, Mississippi, to the various dealers within Mississippi that have been taxed.

The Complainant inspects the vehicles here in Jackson prior to accepting them in order to ascertain if they might have been damaged in transit. After the petitioner ac-

cepts the vehicles from General Motors at Jackson, Mississippi, as evidenced by a stamped receipt, they are loaded on the truck equipment and delivered to the various dealers located in Mississippi as shown on the original bill of lading. General Motors ships under two separate hauling contracts, one with the railroad and the other with complainant. General Motors pays both complainant and the railroads, under separate billings.

The State of Mississippi, pursuant to the authority of Sections 10105 and 10109(2) of the Mississippi Code of 1942, levied a sales tax on the gross receipts earned by the complainant from transporting the vehicles from the lot in Jackson, Mississippi, to the various General Motors dealers in the same state. No tax was assessed for transporting the cars from Jackson, Mississippi, to points outside the state. The State Tax Commission assessed the complainant for taxes in the amount of $167,-375.03 for the period August 1, 1968, through July 31, 1972.

The Court is impressed with the fact that once the vehicle was delivered to the rail carrier, General Motors had absolutely nothing further to do with the vehicle. Through rates were established in that both the rail carrier and the truck carrier had on file with the Interstate Commerce Commission the charges that would be made for the portion of the haul performed by each carrier, but joint rates were not in effect, that is, no rates were filed with the Interstate Commerce Commission which would permit General Motors to pay one carrier and have that carrier divide the charges with the other carrier. It was therefore necessary for General Motors to pay to the rail carrier the amount of its charges for the portion of the haul performed by the rail carrier and to pay to the truck carrier the charges for the portion of the haul performed by the truck carrier.

However, this Court feels that it is bound in this cause by the ruling of the Mississippi Supreme Court in *Rhoden* v. *Goodling Enterprises, Inc.*, a Mississippi case of June 4, 1974, 295 So. 2d, 433, which had to do with a cable television system serving the Meridian Naval Air Station in Lauderdale County, Mississippi. The estimate at the time of the trial was that ten to fifteen percent of the signals re-transmitted by the corporation to its subscribers within the State of Mississippi originated outside the State of Mississippi. In reversing the lower court (which had relied primarily on *Fisher's Blend Station, Inc.* v. *Tax Commission of the State of Washington*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956 (1936)) which found that since part of the signals emanated from out-of-state broadcasting stations, the assessment affected interstate commerce and therefore was improper and uncollectible, the Court said:

> "We acknowledge the interstate character of CATV systems . . . ., but nevertheless are of the opinion the tax in the present case was not unduly burdensome to interstate commerce and is not constitutionally prohibited.
>
> "The Fisher's Blend case held that a state occupation tax measured by the gross receipts . . . was an unconstitutional burden upon interstate commerce."

The Court went on to say of that decision:

> "The Court pointed out that the interstate commerce involved was not subject to the risk of repeated exactions of the same nature by other states, thus negating the likelihood of cumulative burdens of unconstitutional proportions."

The Court further went on to say that all of the income upon which the tax could be imposed is derived within this state. This is likewise true in the case at

Bar, since the Commission did not impose a tax upon any deliveries by the Complainant to points outside the State of Mississippi.

Therefore, the prayer for relief must be denied and Complainant's bill of complaint must be dismissed with all costs being taxed to Complainant.

/s/ James Arden Barnett
Chancellor

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title omitted in printing)

DECREE

(Filed August 6, 1974)

This cause having come on for hearing on the 12th day of June, 1974, before the Chancery Court of the First Judicial District of Hinds County, Mississippi, upon a petition filed by Complete Auto Transit, Inc., to declare an assessment of sales tax in the amount of $167,375.03 made by the Mississippi State Tax Commission for the period August 1, 1968, through July 31, 1972, invalid; and this Court, having heard and considered the arguments and evidence presented in the case, and having issued a written opinion in the matter, a copy of which is attached hereto and made a part hereof, doth find:

That the prayer for relief asked for by the complainant, Complete Auto Transit, Inc., must be denied, and the bill of complaint must be dismissed with all costs being taxed to the complainant.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the prayer for relief asked for by the com-

plainant, Complete Auto Transit, Inc., must be denied, and the bill of complaint must be dismissed with all costs being taxed to the complainant.

The petitioner, Complete Auto Transit, Inc., having announced in open court its desire and intention to appeal from this decree and having petitioned in open court for such an appeal, the defendant being present in court at said time, said petition is granted and appeal allowed.

ORDERED AND ADJUDGED, this the 6th day of August, 1974.

/s/ James Arden Barnett
Chancellor

Approved As to Form:

Attorneys for Complainant:

Butler, Snow, O'Mara, Stevens & Cannada
Attorneys at Law
Post Office Box 22567
Jackson, Mississippi 39205

By: /s/ Robert C. Cannada

Attorneys for Defendant:

/s/ James H. Haddock
James H. Haddock

/s/ Joe D. Gallaspy
Joe D. Gallaspy

/s/ Wilson E. Hodge
Wilson E. Hodge
Post Office Box 960
Jackson, Mississippi 39205

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title omitted in printing)

NOTICE TO COURT REPORTER TO TRANSCRIBE NOTES AND APPELLANT'S DESIGNATION OF RECORD

(August 9, 1974)

TO: MRS. MARY BURKETT
Hinds County Chancery Court Building, Div. IV
Jackson, Mississippi 39201

Dear Mrs. Burkett:

Complete Auto Transit, Inc., complainant in the above styled and numbered cause, feeling aggrieved on account of the Decree entered in said cause, hereby notifies you that it desires that you transcribe and file your stenographic notes of the trial and proceedings in the above styled and numbered cause for purposes of appeal.

Pursuant to and in accordance with the statutes of the State of Mississippi in such cases made and provided, appellant hereby designates the following to be included in the record of this case for purposes of appeal to the Supreme Court of the State of Mississippi:

1. A copy of all pleadings and amendments thereto filed by the parties herein.
2. A transcript or copy of all proceedings conducted by and before the Court prior to the taking of testimony in this cause.
3. A transcript of all testimony of all witnesses who testified in the trial of this cause.

4. All exhibits to testimony introduced in evidence in the trial of this cause.
5. All documentary evidence introduced in the trial of this cause.
6. All testimony offered or tendered, including all exhibits offered or tendered, after the sustaining of an objection thereto.
7. A copy of all motions, objections, rulings of the Court, and other proceedings made in the course of the trial of this cause.
8. A copy of all orders of the Court entered in this cause.
9. A copy of the Opinion of the Court filed in this cause on August 5, 1974.
10. A copy of the Decree rendered and entered in this cause on August 6, 1974
11. A copy of this notice.

Respectfully,

Butler, Snow, O'Mara, Stevens & Cannada

By: /s/ Robert C. Cannada
Robert C. Cannada
Attorneys for Appellant

(Certificate omitted in printing)

IN THE SUPREME COURT OF MISSISSIPPI

No. 48,590

COMPLETE AUTO TRANSIT, INC.

vs.

CHARLES R. BRADY, JR., CHAIRMAN MISSISSIPPI STATE TAX COMMISSION

(Filed April 13, 1976)

BEFORE GILLESPIE, ROBERTSON AND LEE

GILLESPIE, CHIEF JUSTICE, FOR THE COURT:

This case involves an assessment for sales taxes imposed upon Complete Auto Transit, Inc., a Michigan corporation (hereinafter Taxpayer). Taxpayer paid the taxes and filed suit in the Chancery Court of Hinds County to recover the sum paid. From a decree upholding the validity of the assessment, Taxpayer appealed to this Court.

Taxpayer is engaged in the business of hauling motor vehicles for General Motors Corporation. It is a certificated contract carrier operating throughout the United States pursuant to authority of the Interstate Commerce Commission. The Mississippi activity of Taxpayer requires the maintenance of a yard adjacent to a railroad at Jackson where an office, together with facilities for servicing Taxpayer's trucks, is maintained. Taxpayer receives approximately 350 automobiles per day from General Motors Corporation with whom it has a contract which is renegotiated from time to time in order to assure Taxpayer a fair return.

The General Motors plant in Georgia assembles automobiles for delivery to dealers in Mississippi and surrounding areas in other states. A sticker is placed on each

automobile when it leaves the assembly plant in Georgia showing the dealer to whom it is to be sold. The vehicles are then loaded on railroad cars with a bill of lading showing the consignee as General Motors, in care of Complete Auto Transit. The bill of lading also shows the name of the city to which each automobile is to be delivered but not the name of the dealer to whom it is to be sold. The automobiles are transported to Jackson, Mississippi, by railroad and are unloaded onto Taxpayer's yard adjacent to the railroad. The bill of lading is then stamped "Received by General Motors Corporation, Chevrolet Motor Division, by Complete Auto Transit, Inc." The vehicles are then inspected for damage, and Taxpayer prepares waybills showing the shipper as General Motors Corporation, the description of the automobiles, and the names of the consignees (General Motors dealers in cities other than Jackson). As soon as practical, usually within twenty-four to forty-eight hours, the vehicles are loaded on Taxpayer's trucks and delivered to dealers at various points in and out of the State of Mississippi.

Taxpayer is paid on a contract basis, and ordinarily no bill is rendered by Taxpayer to General Motors Corporation. The entire transportation charge is collected by General Motors from the Dealer who ultimately receives the vehicle. The charges paid by General Motors to Taxpayer for transportation of vehicles from Jackson, Mississippi, to various General Motors dealers within the state are readily separable from charges for transporting vehicles from Jackson beyond the borders of Mississippi. Likewise, the transportation charges paid the railroad company are in no way connected to the charges paid by General Motors to Taxpayer.

The question is whether the gross income derived by Taxpayer from transporting automobiles from Jackson

to other points in the State of Mississippi is taxable by the State.

The statute levying the tax is Mississippi Code Annotated section 27-65-13 (1972), which provides:

> There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

The following sections, referred to in the statute, *supra,* describe the businesses taxed as "truck or any other transportation business for the transportation of property for compensation . . . between points within the state. . . ." The amount of the tax is five percent of the gross income.

The general rule is that a state may tax a local activity affecting or related to interstate commerce if the local activity is sufficiently separate from the out-of-state aspects of interstate commerce. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 92 L. Ed. 1832, 68 S.Ct. 1475 (1948). However, such a tax is invalid if there exists the danger that it can impose cumulative burdens on interstate commerce not borne by local commerce. General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964). The local activity taxed must be one that does not lend itself to repeated exactions in other states. Memphis Natural Gas Co. v. Stone, *supra.*

The present case is controlled by cases arising in this State. Interstate Oil Pipe Line Co. v. Stone, 203 Miss. 715, 35 So.2d 73 (Miss. 1948), aff'd. 337 U.S. 662, 93 L.Ed. 1613, 69 S.Ct. 1264 (1949), involved the first leg of an

interstate shipment. The tax was levied on the gross receipts from the operation of the oil pipelines wholly within the State. *Interstate* operated pipelines which were used to transport oil from various fields in Mississippi to loading racks adjacent to railroads elsewhere in the State. From the racks, the oil was pumped into railroad tank cars for shipment outside the State. If no tank cars were available, the oil was stored in tanks near the loading racks for short durations until cars were available. When the oil was delivered to *Interstate,* it was accompanied by shipping orders from the producer or owner directing that the oil be transported to out-of-state destinations. There was no through bill of lading from the point of origin at the fields to the point of destination outside the State. *Interstate* was paid on a per barrel rate, specified in its tariff, for transporting the oil from the gathering point to the loading rack at the railroad. In upholding the validity of the tax, the Supreme Court of the United States said in a plurality opinion that it would not pause to consider whether the business of operating the pipeline was in interstate commerce, for the State had the power to impose the tax involved. The Court said that the tax was not invalidated by the commerce clause of the Federal Constitution merely because it imposed a direct tax on the privilege of engaging in interstate commerce. The Court concluded as follows:

> Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce

clause does not invalidate this tax. The judgment is affirmed. 337 U.S. at 668, 93 L.Ed. at 1620-21.

A case involving the final leg of an interstate shipment is *McKeigney* v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802 (1955), suggestion of error overruled, 81 So.2d 712 (1955), appeal dismissed *sub nom. Dunn Brothers, Inc.* v. *Stone,* 350 U.S. 878 (1955). In *Dunn* the tax was levied upon the activities of Dunn Brothers under the following state of facts. Tennessee Gas Transmission Company was engaged in constructing an interstate pipeline which crossed several states, including Mississippi. It purchased pipe for this purpose from California and had it delivered by common carriers to its right-of-way in Mississippi. To accomplish this, it had the railroad company deliver the pipe from the foundry in California to depots or rail heads in Mississippi as near to its right-of-way as was feasible. It engaged Dunn Brothers, a Texas corporation holding a certificate of public convenience and necessity for interstate commerce, to deliver the pipe by motor truck from the depots or rail heads in Mississippi to the rights-of-way of the transmission company. The transmission company, as consignor, shipped the pipe by railroad to itself as consignee to the various depots and rail heads in Mississippi. Bills of lading were issued accordingly. The transmission company paid the freight, and when the shipments arrived at the rail destination, an agent of the transmission company inspected and accepted the pipe. Dunn Brothers then took charge of the shipment, and with the transmission company as both consignor and consignee, unloaded the car and delivered it to the right-of-way, for which service the transmission company paid Dunn Brothers. Based on *Interstate Oil Pipeline Co.* v. *Stone, supra,* and other decisions of the United States Supreme Court, this Court held that the tax was validly levied.

More recently, this Court upheld a tax on the gross income derived from the operation of a television cable system where a percentage of the signals rebroadcast by the taxpayer were received from outside the State. Rhoden v. Goodling Enterprises, Inc., 295 So.2d 433 (Miss. 1974).

In *Convoy Company* v. *Taylor*, 334 P.2d 772 (Wash. 1959), the Supreme Court of the State of Washington upheld a tax on an activity almost identical to that involved in the present case. In *Convoy,* the proof showed that Ford Motor Company, the shipper in that case, maintained control of the automobiles shipped so as to protect itself if the dealer became bankrupt or failed to pay for the units.

In the present case, General Motors maintains control of the vehicles, at least until they are shipped out by Taxpayer. The automobiles are consigned to General Motors at Jackson and are their property to do with as they see fit until they are ultimately transported by Taxpayer to the purchasing dealer.

It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case.

For the reasons stated, we hold that the tax was valid and the decree of the trial court is affirmed.

AFFIRMED.

PATTERSON, P.J., INZER, P.J., AND SMITH, ROBERTSON, SUGG, WALKER, BROOM AND LEE, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI
TUESDAY, APRIL 13, 1976, COURT SITTING

#48,590

COMPLETE AUTO TRANSIT, INC.

vs.

CHARLES R. BRADY, JR., CHAIRMAN
MISSISSIPPI STATE TAX
COMMISSION

(Filed April 13, 1976)

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court, First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on the 6th day of August, 1974—be and the same is hereby affirmed. It is further ordered, adjudged and decreed that the appellant and Fidelity & Deposit Company of Maryland, sureties on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.

MINUTE BOOK "BR" PAGE 424

I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgment entered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office in the City of Jackson, Miss., this the 24th day of June A. D., 1976.

/s/ Julia H. Kendrick
Clerk Supreme Court

IN THE SUPREME COURT OF MISSISSIPPI

(Title omitted in printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed June 9, 1976)

Notice is hereby given that Complete Auto Transit, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Mississippi affirming the decree upholding the assessment of sales tax, entered in this action on April 13, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Robert C. Cannada
D. Carl Black, Jr.
Alan W. Perry
Rhesa H. Barksdale
By: /s/ Robert C. Cannada
Counsel for Appellant

Of Counsel:
Butler, Snow, O'Mara, Stevens & Cannada
Post Office Box 22567
1700 Deposit Guaranty Plaza
Jackson, Mississippi 39205

(Certificate omitted in printing)

Supreme Court, U. S.
FILED
AUG 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

JAMES H. HADDOCK
JOE D. GALLASPY
WILLIAM N. LOVELADY, JR.
Post Office Box 1033
Jackson, Mississippi 39205
Counsel for Appellee

R. L. MERRIHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3080

INDEX

Motion to Dismiss or Affirm 1

I. Statement of the Case 2

II. Argument 3

Point 1. The Transportation Activity Involved in This Cause Was Intrastate in Nature and Thus Subject to the Assessment Levied Upon It by the Mississippi State Tax Commission 3

Point 2. Even If the Transportation Activity in Question Is Construed to Be Interstate Commerce, the Tax Assessment Should Be Affirmed in That It Did Not Contravene the Interstate Commerce Clause of the United States Constitution Since the Tax Did Not Place an Undue Burden on Interstate Commerce 7

III. Certificate of Service 12

Citations

Cases

Convoy Company v. *Taylor*, 334 P.2d 772 (Wash. 1959) 4

Dunn Brothers, Inc. v. *Stone*, 350 U.S. 878, 76 S.Ct. 139, 100 L.Ed. 775 (1955) 4, 5, 6

Interstate Oil Pipe Line Co. v. *Stone*, 203 Miss. 715, 35 So.2d 73 (Miss. 1948), aff'd 337 U.S. 662, 93 L.Ed. 1613, 69 S.Ct. 1264 (1949) 4, 5, 6, 8, 10

McKeigney v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802 (1955), suggestion of error overruled, 81 So.2d 712 (1955), appeal dismissed for want of a substantial federal question, *Dunn Brothers, Inc.* v. *Stone*, 350 U.S. 878, 76 S.Ct. 139, 100 L.Ed. 775 (1955) 5

Maine v. *Grand Trunk R. Co.*, 142 U.S. 217, 35 L.Ed. 994 (1891) 9

Memphis Natural Gas Co. v. *Stone*, 335 U.S. 80, 90 L.Ed. 1832, 68 S.Ct. 1475 (1948) 7

Rhoden v. *Goodling Enterprises, Inc.*, 295 So.2d 433 (Miss. 1974) 7

Spector Motor Service, Inc. v. *O'Conner*, 340 U.S. 602 (1951) 9

Stone v. *Interstate Natural Gas Co.*, (CCA-5) 103 F.2d 544, aff'd 308 U.S. 522, 84 L.Ed. 442 (1939) 9

STATUTES

Mississippi Code of 1942 (Supp. 1972)—

§10109(2) 4

OTHER AUTHORITIES

Corpus Juris Secundum—

15 C.J.S. *Commerce* §102(2) 7

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this case be dismissed on the following grounds:

1. The appeal does not present a substantial federal question; and the judgment of the Supreme Court of the State of Mississippi rests on an adequate non-federal basis.

I.

STATEMENT OF THE CASE

This case involves an assessment for sales taxes made by the Mississippi State Tax Commission upon the appellant, Complete Auto Transit, Inc. The appellant, a Michigan corporation, had contracted with General Motors Corporation to haul certain motor vehicles from Jackson, Mississippi, to various General Motors dealers within the State of Mississippi.

The State Tax Commission pursuant to its authority under Sections 10105 and 10109(2), Mississippi Code of 1942 (Supp. 1972), made an assessment upon the gross receipts earned by the appellant corporation for transporting various vehicles from Jackson, Mississippi, to other points within the State of Mississippi.

The vehicles were initially shipped by rail from a General Motors manufacturing plant located outside of the State of Mississippi to a railhead ramp and storage area located in Jackson, Mississippi. At the time the vehicles were placed on railroad cars at the assembly plant, a straight bill of lading was prepared by General Motors as consignor naming itself as consignee in care of Complete Auto Transit, Inc., in Jackson, Mississippi. Upon arrival in Jackson, the shipping documents were stamped Received General Motors Corp., by Complete Auto Transit. Subsequent to the receipt of the vehicles in Jackson, the appellant would prepare a waybill from General Motors, Jackson, Mississippi, consignor, to designated dealers in Mississippi as consignee, load the vehicles on trucks, and transport the designated units to various dealers throughout the state.

The State Tax Commission made no assessment upon the appellant for the transportation of motor vehicles from Jackson, Mississippi, to points outside of the state. Also, there was no tax levied upon the railroads for transporting the vehicles into Jackson from outside of the State of Mississippi. The taxes that are the question of this case were restricted to the transportation of the motor vehicles from Jackson, Mississippi, to points within the State of Mississippi itself. For the period August 1, 1968, through July 31, 1972, the Mississippi State Tax Commission assessed Complete Auto Transit, Inc., taxes in the amount of $167,375.30.

The assessment of the State Tax Commission was appealed to the Chancery Court of Hinds County, Mississippi. After a complete hearing on the matter, Chancery Court entered its decree on August 6, 1974, affirming the assessment. Upon appeal, the order of the lower court was affirmed by the Supreme Court of the State of Mississippi on April 13, 1976. The case is reported at 330 So.2d 268.

II.

ARGUMENT

POINT 1

The Transportation Activity Involved in This Cause Was Intrastate in Nature and Thus Subject to the Assessment Levied Upon It by the Mississippi State Tax Commission.

This case involves the taxation by the Mississippi State Tax Commission of a transportation activity that was purely of an intrastate nature. The activity being assessed

transpired entirely within the boundaries of the State of Mississippi.

The Mississippi State Tax Commission relied upon Sections 10105 and 10109(2) of the Mississippi Code of 1942 (Supp. 1972) in assessing a tax upon the transportation activity that is the subject of this case. Section 10109 (2) provides in part as follows: "Upon every person operating a railroad, airplane, bus, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed and shall be collected, a tax equal to five percent (5%) of the gross income of such business, . . ."

The Mississippi Supreme Court in affirming the assessment of the State Tax Commission relied upon a case previously decided by the Supreme Court of the State of Washington, *Convoy Company* v. *Taylor,* 334 P.2d 772 (Wash. 1959). The factual situation found in *Convoy* was identical to that found in the case presently before this Court. In *Convoy,* Ford Motor Company shipped its cars from assembly plants in California to its local dealers in Washington in the same manner employed by General Motors in our case (R. 110 and 111). The automobiles were shipped by rail on a straight bill of lading with Ford Motor Company as consignor and "Ford Motor Company, c/o Convoy Co., Seattle, Wash." as consignee. The Supreme Court of Washington, as did the Mississippi Supreme Court in the present case, relied upon the cases of *Interstate Oil Pipe Line Co.* v. *Stone, infra,* and *Dunn Brothers, Inc.* v. *Stone, infra,* in holding that the assessment of the tax did not contravene the Interstate Commerce Clause of the United States Constitution because the transportation of the automobiles from the railroad depot in Seattle,

Washington, to other cities in the State of Washington constituted intrastate commerce.

The Supreme Court of the State of Mississippi in affirming the assessment of the tax in question relied heavily upon two cases which were previously dealt with by this Court, *Interstate Oil Pipe Line Co.* v. *Stone,* 203 Miss. 715, 35 So.2d 73 (Miss. 1948), aff'd 337 U.S. 662, 93 L.Ed. 1613, 69 S.Ct. 1264 (1949) and *McKeigney* v. *Dunn Brothers, Inc.,* 224 Miss. 762, 80 So.2d 802 (1955), suggestion of error overruled, 81 So.2d 712 (1955), appeal dismissed for want of a substantial federal question, *Dunn Brothers, Inc.* v. *Stone,* 350 U.S. 878, 76 S.Ct. 139, 100 L.Ed. 775 (1955). In *Interstate* the Court upheld a tax upon the gross receipts of the operation of a pipeline wholly within the State of Mississippi. The pipeline was used to transport oil from various oil fields in the state to loading racks adjacent to railroads elsewhere in the state, where the oil was subsequently transported out of state. This Court in its opinion stated that it would not pause to consider whether the business of operating the pipeline was in interstate commerce, for the State had the power to impose the tax involved. The Mississippi Supreme Court in the case at bar in its opinion (Appendix A5, Jurisdictional Statement) quotes directly from the Supreme Court's opinion:

> "Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other

state can repeat the tax. For these reasons the commerce clause does not invalidate this tax. The judgment is affirmed. 337 U.S. at 668, 93 L.Ed. at 1620-21."

In the *Dunn Brothers* case, a gas transmission company constructing an interstate pipeline which crossed several states, including Mississippi, through an arrangement very similar to that employed by the appellant in the case at bar, shipped pipe by railroad to themselves as "consignee" at a railhead ramp in Mississippi. Dunn Brothers, holding a certificate of public convenience and necessity issued for interstate commerce, was engaged to deliver the pipe from the railhead ramps to the rights of way of the transmission company. The transmission company, like General Motors (R. 110 and 111), shipped the pipe as consignor by railroad to itself as consignee at railhead ramps in Mississippi. The Mississippi Supreme Court held that the tax levied upon the transportation activity was valid and concluded in part as follows: "So, the service by Dunn Brothers in carrying the pipe, after its acceptance by the Transmission Company, from depot or railhead in Mississippi to the right of way also in Mississippi, was an activity wholly within the State of Mississippi, was therefore intrastate, and the gross income therefrom was subject to the tax of two percent."

The *Dunn Brothers* case was subsequently appealed to the United States Supreme Court, wherein the appeal was dismissed for want of a substantial federal question.

Based upon the authority cited in its opinion (Appendix A, Jurisdictional Statement), the Mississippi Supreme Court has held that the transportation activity at issue was intrastate in nature and thus subject to the tax in question.

POINT 2

Even If the Transportation Activity in Question Is Construed to Be Interstate Commerce, the Tax Assessment Should Be Affirmed in That It Did Not Contravene the Interstate Commerce Clause of the United States Constitution Since the Tax Did Not Place an Undue Burden on Interstate Commerce.

As stated in the Mississippi Supreme Court's opinion (appearing at Appendix A3, Jurisdictional Statement): "The general rule is that a state may tax a local activity affecting or related to interstate commerce if the local activity is sufficiently separate from the out-of-state aspects of interstate commerce. *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80, 90 L.Ed. 1832, 68 S.Ct. 1475 (1948)."

It is further stated at 15 C.J.S. *Commerce* §102(2):

"It is not the purpose of the commerce clause to relieve those engaged in interstate or foreign commerce from their just share of the state tax burden even though it increases the cost of doing business, and a tax which does no more than impose on those engaged in interstate commerce or their property a reasonable share of the burdens of government will not be condemned. The prohibited burden on interstate or foreign commerce is created by state interference with that commerce which is a matter distinct from the expense of doing business. Even interstate business must pay its way by bearing its share of local tax burdens. Interstate commerce is not immunized from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state."

The Mississippi Supreme Court in the present case cited the case of *Rhoden* v. *Goodling Enterprises, Inc.*, 295 So.2d 433 (Miss. 1974), wherein the Court upheld a tax upon the gross income of a cable television system where a percentage of the signals rebroadcast by the taxpayer were received from outside the state. The Court in reaching its decision in *Goodling*, quotes from the Opinion of the United States Supreme Court in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613 (1949):

> "Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate the tax."

In the *Dunn Brothers* case, *supra*, the Court in affirming a tax upon a transportation activity very similar to that found in the present case stated:

> " 'It is only for the carriage within Mississippi that the tax is demanded. A local drayman or an intrastate carrier would have been obliged to pay the tax here demanded. If, under the circumstances of this case, appellee should prevail, then by reason of its claim of interstate commerce, it would escape the burdens which fall on its competitors in intrastate commerce. Evidently equality for, not favoritism to, interstate commerce was the underlying purpose of Article 1, Section VIII, cl. 3, of the U. S. Constitution.' "

It is settled law that a state may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its gross receipts which are received within the state, *Maine* v. *Grand Trunk R. Co.*, 142 U.S. 217, 35 L.Ed. 994 (1891).

Apportionment presents no problem in this case for all of the transportation performed by appellant was within the taxing state of Mississippi. There can be no contention that rate of tax is unfair or that the tax within itself is discriminatory.

The mere fact that the appellant holds a certificate of convenience and necessity from the Interstate Commerce Commission is insufficient within itself to grant tax exemption. *Stone* v. *Interstate Natural Gas Co.*, (CCA-5) 103 F.2d 544, aff'd 308 U.S. 522, 84 L.Ed. 442 (1939):

> ". . . It is clear also that because a matter is regulable only by one government it is not thereby exempted from taxation by the other."

The appellant cites the case of *Spector Motor Service, Inc.* v. *O'Conner*, 340 U.S. 602 (1951), as authority on which it contends the taxes in the present suit were in violation of the commerce clause of the United States Constitution. The *Spector* case does not involve the same facts as the case at bar. In *Spector*, the petitioner, by motor carrier, transported goods through several different states without any break in the shipment of the goods prior to the time they were delivered to their ultimate destination. The United States Supreme Court held that the imposition of a franchise tax by the State of Connecticut based on the property owned by the petitioner contravened the interstate commerce clause of he United States

Constitution. However, the Court reaffirmed the rule announced in cases such as *Interstate Oil Pipe Line Company* v. *Stone, supra*:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. Interstate Oil Pipe Line Co. v. Stone, supra; International Harvester Co. v. Evatt, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390; Atlantic Lumber Co. v. Com'r of Corporations and Taxation, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328. The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633, or the publication of a newspaper, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. See also, Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832."

In the concluding paragraph of the Mississippi Supreme Court's Opinion (appearing at Appendix A7, Jurisdictional Statement), the Court stated as follows:

> "It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no

> danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case."

WHEREFORE, PREMISES CONSIDERED, appellee prays that the appeal in this case be dismissed or that the judgment of the Supreme Court of the State of Mississippi be affirmed.

Respectfully submitted,

JAMES H. HADDOCK
Attorney for Appellee
Post Office Box 1033
Jackson, Mississippi 39205

Of Counsel

JOE D. GALLASPY
Post Office Box 1033
Jackson, Mississippi 39205

WILLIAM N. LOVELADY, JR.
Post Office Box 1033
Jackson, Mississippi 39205

III.

CERTIFICATE OF SERVICE

I, James H. Haddock, one of the counsel for appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of August, 1976, I served copies of the foregoing Motion to Dismiss or Affirm on all parties required to be served, by depositing copies of said Motion to Dismiss or Affirm in the United States Post Office, properly addressed, with first class postage prepaid, to Mr. Robert C. Cannada, Butler, Snow, O'Mara, Stevens and Cannada, at Post Office Box 22567, Jackson, Mississippi 39205, counsel of record for the appellant.

JAMES H. HADDOCK

Supreme Court, U. S.
FILED
SEP 20 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETF AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REPLY TO MOTION TO DISMISS OR AFFIRM

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK, JR.
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-2030

INDEX

Reply to Motion to Dismiss or Affirm 1

Conclusion 7

Authorities

CASES

Alpha Portland Cement Co. v. *Massachusetts*, 268 U.S. 203 (1925) 6

American Express Company v. *Miller*, 104 Miss. 247, 61 So. 306 (1913) 4

Atlantic and Pacific Tel. Co. v. *Philadelphia*, 190 U.S. 160 (1903) 5

Colonial Pipeline v. *Traigle*, 421 U.S. 100 (1975) 5, 7

Convoy Company v. *Taylor*, 334 P.2d 772 (Wash. 1959) 7

Memphis Steam Laundry v. *Stone*, 342 U.S. 389 (1951) 3

Minnesota v. *Blasius*, 290 U.S. 1 (1933) 4

Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 5, 6

Railway Express, Inc. v. *Virginia*, 347 U.S. 359 (1954) 4, 5, 7

Spector Motor Service, Inc. v. *O'Connor*, 340 U.S. 602 (1951) 2, 5, 6, 7

United States v. *Hill*, 248 U.S. 420 (1918) 3

United States v. *Yellow Cab Company*, 332 U.S. 218 (1946) 4

OTHER AUTHORITY

21 C.J.S., *Courts*, §206 3

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REPLY TO MOTION TO DISMISS OR AFFIRM

The undisputed facts and the law justifying this Court's review of the decision from which this appeal is taken are fully set forth in the Jurisdictional Statement, and we shall not repeat them here. There are, however, certain assertions in the Motion to Dismiss or Affirm that might well be misleading. Consequently, we shall briefly reply to that Motion.

I.

First, appellee asserts that the transportation involved was intrastate in nature. With deference, we firmly submit that the Mississippi Supreme Court did *not* hold that the transportation involved in this case was intrastate in nature. We further submit that if it did so hold, such holding was manifestly incorrect.

Any fair and unstrained reading of the decisions of the trial court and the Mississippi Supreme Court clearly shows that both courts held that, *notwithstanding the fact that the transportation was interstate commerce,* the State could levy a privilege tax thereon so long as no other state could duplicate the tax involved and thereby impose cumulative burdens (J.S. A7). As shown in the Jurisdictional Statement, and as discussed more fully in Point II below, that conclusion is manifestly erroneous and in direct conflict with the prior decisions of this Court (J.S. 8-11).

Plainly and simply put, it is firmly established that a state cannot levy a tax on the *privilege* of engaging in exclusively interstate commerce, no matter how fairly the tax is apportioned to the activities conducted within a state, and regardless of the fact that no other state can duplicate the privilege tax.

State taxes *other than* privilege taxes may be imposed on interstate commerce, provided they do not constitute an undue burden and are non-discriminatory. However, a state privilege tax is an impermissible *direct* burden on, and a forbidden regulation of, interstate commerce itself, since the *privilege* of doing an interstate business is not "subject to the sovereign power of the state." *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602, 609 (1951). Therefore, the constitutional infirmity of a *privilege* tax persists even if the tax is non-discriminatory. *Id.,* at 608-609.

If, however, we are mistaken in our reading of the holding below, and if the Mississippi Supreme Court did hold that the transportation was intrastate commerce, then we firmly submit that such holding was not only wrong but also provides no support whatsoever for the Motion. The question of what is or what is not interstate commerce is a federal constitutional question that must be determined

by the federal courts in the exercise of their own independent judgment. Consequently, there is a total lack of merit in the appellee's argument (Motion, p. 1) that the asserted holding (that the transportation was intrastate) causes the decision to rest on "an adequate non-federal basis." *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389, 392 (1951); and cases collected in 21 C.J.S., *Courts,* §206, pp. 269-270 n. 38.

Furthermore, if the Mississippi Supreme Court did hold that the transportation was intrastate in character, that holding is patently wrong. The *facts* are not in dispute (J.S. A8). It is undisputed that the vehicles in question were shipped from outside of the State of Mississippi and, from the inception of the movement, were consigned to specific dealers in Mississippi and other states. Thus there can be no question that the transportation was interstate commerce. "Importation into one state from another is the indispensable element—the test—of interstate commerce." *United States* v. *Hill,* 248 U.S. 420, 424 (1918).

The mere fact that there was a change in the *mode* of transportation (from rail to truck) does not affect or diminish the essential interstate character of the transportation. Likewise, the fact that the movement *by truck* was wholly within Mississippi is irrelevant. In addition, the fact that additional shipping documents were necessitated by the change in the mode of transportation is wholly irrelevant. The important fact is that the transportation was a continuous, prearranged movement from a point in one state to various points in other states; as such, the essential character of the transportation was, and at all times remained, interstate commerce.

The foregoing principles are abundantly supported by both reason and precedent. Explicitly basing its holding on the decisions of this Court, the Mississippi Supreme Court has heretofore held that every part or link of a con-

tinuous passage from a point in one state to a point in another state is interstate commerce, even though a particular part of the carriage is entirely within the limits of one state, and even though the carriers are separate and independent, with no joint traffic arrangement. *American Express Company* v. *Miller,* 104 Miss. 247, 249-250, 61 So. 306, 307 (1913). See also *United States* v. *Yellow Cab Company,* 332 U.S. 218, 228-229 (1946).

Likewise, the continuity and the interstate character of an interstate shipment are not affected by changes in, or by the form of, the bills of lading, or by changes in the method or means of transportation. *Minnesota* v. *Blasius,* 290 U.S. 1, 9-10 (1933).

Appellee's argument based on the asserted existence of "local activity" is likewise devoid of merit. Under established precedents, local incidents such as gathering up, putting down, or interchanging interstate commodities, "as an integral part of their interstate movement are not adequate grounds for a state . . . privilege . . . tax." *Railway Express, Inc.* v. *Virginia,* 347 U.S. 359, 368 (1954). More important, however, there is no indication in the opinions of the courts below that this tax was in fact imposed on any such "local incident," and there is no language in the statute (set out at J.S., p. 3) that authorizes the imposition of this tax on any such "local incident." Thus, this argument is no more than a belated attempt by the Tax Commission to rewrite the statute, as well as the opinions of the two courts below, to find a constitutionally-acceptable basis for the imposition of this tax.

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, we respectfully submit that there is no merit whatsoever in the argument set forth in Point I of the Motion.

II.

In Point II of the Motion, appellee argues that, even conceding that the transportation in question was interstate commerce, the tax was valid because it "did not place an undue burden on interstate commerce." We submit that this argument is completely wide of the mark.

As previously shown, the question in this case is not whether the tax placed an undue burden on interstate commerce or whether it discriminated against interstate commerce. The important and controlling fact is that this was a *privilege* tax on the privilege of engaging in exclusively interstate commerce.

This Court has consistently held that such a *privilege* tax cannot constitutionally be imposed, regardless of whether it "unduly burdens" interstate commerce, regardless of whether it "discriminates" against interstate commerce, and regardless of whether the income which is the measure of the tax is fairly apportioned to the state. These principles are firmly established by a host of cases, including *Spector, Railway Express, Inc., Colonial Pipeline* v. *Traigle,* 421 U.S. 100 (1975) (discussed fully at J.S. 8-11); and *Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 458, 463 n. 7 (1959).

Taxes imposed upon the privilege of carrying on interstate commerce, regardless of the amount of the tax, have uniformly been held obnoxious to the commerce clause on the ground that the privilege is given by the national government and not by the state government. This Court has said that "No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce." *Atlantic and Pacific Tel. Co.* v. *Philadelphia,* 190 U.S. 160, 162 (1903). Similarly, "Any such excise burdens interstate commerce and is therefore

invalid, without regard to measure or amount." *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203, 217 (1925). Moreover, "the constitutional infirmity of such a tax persists, no matter how fairly it is apportioned to business done within the state", *Spector,* 340 U.S. at 609.

In stressing the difference between state "privilege" taxes and other state taxes, this Court has said:

> "[I]t is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce
>
> * * *
>
> This Court has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a State, and that the assertion of state power to tax the 'privilege' is, therefore, a forbidden attempt to 'regulate' interstate commerce."

Portland Cement Co. v. *Minnesota,* 358 U.S. 450, 458, 463 n. 7 (1959).

With due deference, appellee's whole argument seeks to ignore or gloss over the fact that the tax involved is a privilege tax on the doing of an exclusively interstate business. As such, its constitutional invalidity is clear.

III.

Finally, we note that the appellee has not taken issue with our assertion that this case presents an issue of national importance. As noted in the Jurisdictional Statement, this case is of major significance to all common and contract carriers transporting goods or passengers, as well as to other businesses of an interstate character.

If this appeal is dismissed, the decision of the Mississippi Supreme Court will invite other states to impose

privilege taxes on businesses of a purely interstate character. This decision, if not reversed, will in all probability produce a number of similar cases which this Court will ultimately have to resolve.

As an example of the "ripple effect" that this decision will create we need only point to the result of the decision of the Washington Supreme Court in *Convoy Company* v. *Taylor,* 334 P.2d 772 (Wash. 1959). Clearly, one of the alternative bases for the holding in *Convoy Company*—that a non-discriminatory privilege tax on exclusively interstate commerce is permissible—directly contradicts the holdings of this Court in *Spector, Railway Express, Inc.,* and *Colonial Pipeline.* Nevertheless, it was the erroneous holding in *Convoy Company* (which was not appealed to this Court), which led to the erroneous holding of the Mississippi Supreme Court in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion should be denied, probable jurisdiction should be noted, and the judgment of the Mississippi Supreme Court summarily reversed.

Respectfully submitted,

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK, JR.
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

Supreme Court, U. S.
FILED
NOV 16 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF THE APPELLANT

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Constitutional Provision and Statutes Involved 2

Question Presented 3

Statement of the Case 3

Summary of the Argument 9

Argument—

I. Complete Auto Was Engaged Solely in Interstate Commerce 11

II. The Prior Decisions of This Court Hold That a State Cannot Levy a Privilege Tax on Interstate Commerce 14

III. The Rule Announced in the Prior Decisions of This Court Is Supported by Both Reason and Principle 20

A. State and Local Privilege Taxes Would Unduly Burden Interstate Commerce 20

B. Congress Has Recognized and Relied Upon the Rule That a State May Not Tax the Privilege of Engaging in Interstate Commerce 27

IV. Complete Auto Would Be Severely Prejudiced by a Retroactive Imposition of Taxes 33

Conclusion 36

Appendix A—Section 27-65-19, Mississippi Code of 1972, Annotated 37

Appendix B—Public Law 86-272 39

Appendix C—Public Law 87-17 43

Appendix D—Section 27-65-31, Mississippi Code of 1972, Annotated 44

Table of Authorities

CASES

Alpha Portland Cement Co. v. *Massachusetts*, 268 U.S. 203 (1925) 15
American Express Company v. *Miller*, 104 Miss. 247, 61 So. 307 (1913) 14
Atlantic and Pacific Tel. Co. v. *Philadelphia*, 190 U.S. 160 (1903) 15
Braniff Airways v. *Nebraska Board of Equalization*, 347 U.S. 590 (1954) 26
Brown v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827) 21
Colonial Pipeline v. *Traigle*, 421 U.S. 100 (1975) 18, 19, 20, 22, 33, 36
Cooley v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851) 11, 13
Interstate Oil Pipeline Co. v. *Stone*, 337 U.S. 662 (1949) 19
Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) 22
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 17, 20
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 34 (1940) 25
Memphis Natural Gas Co. v. *Stone*, 335 U.S. 80 (1948) 19
Minnesota v. *Blasius*, 290 U.S. 1 (1933) 14
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1958) 15, 17, 24, 26, 27, 29
Railway Express, Inc. v. *Virginia*, 347 U.S. 359 (1954) (*Railway Express I*) 18, 19, 20, 22, 24, 34, 36
Railway Express, Inc. v. *Virginia*, 358 U.S. 434 (1959) (*Railway Express II*) 18
Scripto, Inc. v. *Carson*, 360 U.S. 207 (1960) 28

Spector Motor Service, Inc. v. *O'Connor*, 340 U.S. 602 (1951) 9, 10, 16, 17, 18, 19, 20, 22, 24, 26, 31, 33, 34, 36
United States v. *Yellow Cab Company*, 332 U.S. 218 (1946) 14
Western Oil Refining Company v. *Lipscomb*, 244 U.S. 346 (1917) 13

CONSTITUTIONAL PROVISION AND STATUTES

Article I, § 8, cl. 3, Constitution of the United States 2

Mississippi Code of 1942—
Sections 9427 *et seq.* 25
Sections 9825 *et seq.* 26
Sections 9837 *et seq.* 26
Sections 9853-01 *et seq.* 26
Sections 10103 *et seq.* 25
Section 10105 ..... 2, 4
Section 10109 (2) 3, 4
Section 10117 33
Section 10121.1 1

Mississippi Code of 1972, Annotated—
Sections 27-15-1—251 25
Sections 27-17-1—521 25
Sections 27-35-301—711 26
Sections 27-65-1—29 25
Section 27-65-13 2
Section 27-65-19 (2) 3
Section 27-65-29 (d) (1) 25
Section 27-65-31 33
Section 27-65-47 1

Mississippi Laws 1972, Chapter 506 .....3, 25
Public Law 86-272, 73 Stat. 555 (1959) 27, 29, 31, 32
Public Law 87-17, 75 Stat. 41 (1961) 28, 32
28 U.S.C. § 1257 (2) 2

OTHER AUTHORITIES

Beveridge, I The Life of John Marshall, 310-11 (1916) 21
Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 229 (1957) 21, 22
114 Cong. Rec. 14,432-33 (1968) 30
115 Cong. Rec. 17,323 (1969) 30
Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Finance Comm., 93d Cong., 1st Sess. (1973) 30
Hearings on H.R. 11798 Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) 30
H.R. Rep. No. 565, 89th Cong., 1st Sess. 1965) 30, 34
H.R. Rep. No. 952, 89th Cong., 1st Sess. (1965) 30
H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964) 28, 30
H.R. Rep. No. 2013, 89th Cong., 2d Sess. (1966) 27, 30, 31, 36
H.R. Rep. No. 2158, 90th Cong., 2d Sess. (1968) 30
H.R. Rep. No. 7906, 91st Cong., 1st Sess. (1969) 30
Preemption As a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208, 225 (1959) 32
S.B. 2080, 94th Cong., 1st Sess. (1975) 30, 36

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi (App. 106) is reported at 330 So.2d 268. The opinion of the Chancery Court of Hinds County, Mississippi (App. 99) is not reported.

JURISDICTION

This action was commenced in the Chancery Court of Hinds County, Mississippi, pursuant to Section 10121.1, Mississippi Code of 1942 (now codified as Section 27-65-47, Mississippi Code of 1972, Annotated, Volume 9, page 52) seeking a refund of privilege taxes assessed against appellant Complete Auto Transit, Inc. The decree of the

Chancery Court upholding the assessment was entered on August 6, 1974 (App. 102).

Upon timely appeal, the order of the Chancery Court was affirmed by the Supreme Court of the State of Mississippi, which held that the privilege tax statute was constitutionally valid as applied to Complete Auto Transit, Inc. The opinion and judgment (App. 112) of the Mississippi Supreme Court were filed on April 13, 1976.

The Notice of Appeal to this Court (App. 113) was filed in the Mississippi Supreme Court on June 9, 1976. This appeal was docketed on July 12, 1976. Probable jurisdiction was noted on October 4, 1976. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal is predicated upon the Interstate Commerce Clause of the Constitution of the United States (Art. I, § 8, cl. 3), which provides that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The following statutes were in effect at all times relevant to this litigation and formed the basis for the assessment of the tax at issue.

Section 10105 of Mississippi Code of 1942 (now codified as Section 27-65-13, Mississippi Code of 1972, Annotated, Vol. 9, page 12), which reads as follows:

> There is hereby levied and assessed, and shall be collected, *privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this

> state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections. (Emphasis added.)

and Section 10109 (2), Mississippi Code of 1942 (codified as Section 27-65-19 (2), Mississippi Code of 1972, Annotated, Vol. 9, page 20), which provided[1] in part as follows:

> Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent (5%) of the gross income of such business. . . .[2]

QUESTION PRESENTED

The following question is presented by this appeal:

Whether the State of Mississippi may constitutionally impose a tax on the Appellant solely for the privilege of engaging in exclusively interstate commerce.

STATEMENT OF THE CASE

This case involves an assessment for privilege taxes imposed upon Appellant Complete Auto Transit, Inc. (Complete Auto), a Michigan corporation. Pursuant to authority

---

1. The statute was amended effective as of August 1, 1972, so as to exclude the transportation of property. Mississippi Laws 1972, Chapter 506. The statute as amended appears in Mississippi Code of 1972, Annotated, Supp. to Vol. 9, pages 14-15.

2. The full text of the statute is set out in Appendix A to this Brief.

granted by the Interstate Commerce Commission, Complete Auto operates in every state in the United States, with the exception of Alaska and Hawaii. Complete Auto is engaged in the business of transporting motor vehicles (cars and trucks) by motor carrier for General Motors Corporation (General Motors). All of the vehicles involved in this case were shipped by General Motors from various assembly points located outside the State of Mississippi to designated General Motors dealers in the State of Mississippi. The vehicles were shipped to the dealers in Mississippi via rail to Jackson, Mississippi, and via truck for the final leg of the journey. The interchange between the rail carrier and Complete Auto took place at a railhead ramp in Jackson, Mississippi.

The State Tax Commission, acting under the aforementioned Sections 10105 and 10109 (2), assessed a privilege tax on Complete Auto, measured by the gross revenues earned by Complete Auto for transporting the vehicles from the railhead in Jackson, Mississippi, to the various General Motors dealers located in Mississippi. (No tax was assessed on any portion of the gross income received by Complete Auto for transporting vehicles from the Jackson, Mississippi railhead to dealers located outside the State of Mississippi.) The assessment was predicated on the State Tax Commission's position that the transportation of the vehicles from Jackson to the dealers in Mississippi constituted intrastate commerce. The assessment was in the amount of $167,375.30, for the period August 1, 1968 through July 31, 1972. It is undisputed that the tax levied constituted a tax on the *privilege* of conducting the business.

Upon the trial of the case, the following undisputed facts were established.

Pursuant to its agreements with various General Motors dealers located within the State of Mississippi and elsewhere, General Motors was obligated to manufacture motor vehicles as specifically ordered by each of the dealers and to deliver these vehicles to the dealer at the dealer's location (App. 47). All of the motor vehicles were manufactured at plants located outside of the State of Mississippi (App. 48).

When an order for a particular vehicle was received by General Motors from a dealer, the vehicle was assembled. General Motors then made the decision as to which carrier or carriers would be used to transport the vehicle to the dealer. Since the contract required General Motors to deliver the automobiles at each dealer's location (showroom), it was necessary that the delivering carrier be a motor carrier rather than a rail carrier; in fact, many of the vehicles were transported the entire distance by a motor carrier. However, when greater distances from the assembly point to the delivery points were involved, it was more economical to utilize rail transportation where possible (App. 49). Accordingly, General Motors often used rail carriers for a portion of the journey, and motor carriers, either common or contract, for the last portion of the journey (App. 49-50).

General Motors made all transportation arrangements before the vehicle was shipped from the assembly plant; prior to shipment each vehicle was labelled and identified with respect to the particular dealer to whom the vehicle was to be delivered (App. 52-56). Indeed, General Motors billed the dealer for the automobile when the vehicle was delivered to the railroad (App. 62). Once a vehicle was delivered to the carrier, General Motors had absolutely nothing further to do with the vehicle. The vehicle was in the care, custody, and control of the carriers from that point until the vehicle was delivered to the dealer. Transportation charges for transportation to the dealer's location

were paid by General Motors, and General Motors was reimbursed by the dealer for this cost (App. 62-63).

At the time of the original delivery of the vehicle by General Motors to the rail carrier for transportation to the dealers, a waybill was prepared showing that the entire shipment of vehicles that was to be loaded on the rail car was to be delivered to Complete Auto at Jackson for a continuation of the transportation of each vehicle to the designated dealers. In addition, the exact name and address of the dealer to which each vehicle was to be delivered was placed on or in each vehicle. At the same time General Motors forwarded information to Complete Auto giving Complete Auto a detailed description of each vehicle that was being shipped, the rail car on which it was loaded, the date that it was shipped, and the name and location of the dealer to which the vehicle was to be transported by Complete Auto. This information was received by Complete Auto at its Jackson office prior to the time that the rail car on which the vehicle was being transported would arrive. Thus, in advance of the time that the vehicles actually arrived in Jackson, Complete Auto would know what vehicles were en route, approximately when to expect the vehicles to arrive in Jackson, and the dealer to whom it was to deliver such vehicles. Upon receipt of the information, Complete Auto would make its plans to continue the transportation of each such vehicle to the respective dealers. Accordingly, Complete Auto was able to do most of its paperwork before the motor vehicles actually arrived in Jackson (App. 79-81).

Thus, it is clear from the record that the ultimate destination of each vehicle was clearly identified at the time that it was delivered to the railroad.

After the rail carrier portion of the journey was completed, the rail carrier transferred the vehicles directly to

the motor carrier in Jackson, Mississippi (App. 41). No representative of General Motors was present at the interchange from the rail carrier to the motor carrier (App. 83).

The mechanics for working out the interchange of the vehicles at Jackson were that Complete Auto rented a small parcel of land, together with a small office located thereon, from the railroad (App. 78-79). When the vehicles arrived in Jackson on rail cars, they were unloaded by the railroad and placed on railroad property. As soon as practicable, usually within twenty-four to forty-eight hours, a representative of Complete Auto, together with a representative of the railroad, would inspect each vehicle to see if it had sustained any damage during the rail portion of the journey. If the vehicle was not damaged, it was turned over by the railroad representative to Complete Auto for the continuation of the transportation to the dealer (App. 71-72).[3] If the vehicle had been damaged, this was noted on a document (Exhibit C-4, App. 84, 85) signed by a representative of the rail carrier and a representative of Complete Auto, and the vehicle was then transferred to Complete Auto for completion of the journey to the dealer (App. 83-86). During the period of time involved in this case, an average of approximately 300 vehicles per day were transferred by the rail carrier to Complete Auto at the Jackson interchange point (App. 60).

Complete Auto began transporting motor vehicles from the Jackson, Mississippi ramp in early 1960. The State

---

3. We note here for the sake of accuracy one minor error in the opinion of the Supreme Court of Mississippi. The Court stated (App. 107) that the "bill of lading" was stamped "Received by General Motors Corporation, Chevrolet Division, by Complete Auto Transit, Inc." Actually, the document on which the stamped notation was placed (Exhibit C-1-D, App. 19, 23-24) was not a bill of lading or shipping document; rather, it was a document which was transmitted from General Motors to Complete Auto in Jackson (App. 58, 86). Complete Auto did not execute any written acceptance at the time of taking possession of the automobiles from the railroad (App. 95-96).

Tax Commission first asserted that Complete Auto was subject to this privilege tax during the course of an audit of the three year period August 1, 1968 through July 31, 1971 (App. 37, 77-78). The tax imposed by Sections 10105 and 10109 (2) was in effect (at various rates) for the entire period from 1960 to 1968, but the State made no effort to apply the tax to Complete Auto for such period.

The assessment of the tax at issue here was based on the State Tax Commission's position that the continuation of the transportation of automobiles from Jackson to the dealer's locations in Mississippi was intrastate commerce. Indeed, as pointed out in its Brief in the Mississippi Supreme Court, this was the position of the State Tax Commission throughout the litigation.[4] The original pleading filed by Complete Auto in this cause alleged that its activities constituted interstate commerce (Bill of Complaint, App. 3). Thus, the case presented in the trial court largely centered on this question—whether the operations of Complete Auto consisting of transporting automobiles from Jackson to various dealers' locations in Mississippi constituted interstate or intrastate commerce.

Somewhat unexpectedly, however, the trial court held that the privilege tax statute was valid as applied to Complete Auto even though Complete Auto was engaged in exclusively interstate commerce, since all of the income upon which the tax could be imposed was derived from transportation within the State of Mississippi (see Opinion of the Chancery Court, App. 99). Thus, the constitutional question presented by this appeal formed the basis for the holding of the trial court.

The Mississippi Supreme Court affirmed the trial court, holding that a state can constitutionally impose a

4. See Brief of the Appellee filed in the Mississippi Supreme Court, at page 20.

privilege tax on the conduct of a purely interstate business, so long as the tax is non-discriminatory and is fairly apportioned to operations within the state (Opinion of the Mississippi Supreme Court, App. 106). Thus, the constitutional issue presented by this appeal was entertained by, and formed the basis of the decision of, the Supreme Court of Mississippi.

SUMMARY OF THE ARGUMENT

I. Complete Auto's activities in completing the interstate movement of the motor vehicles from the manufacturing plant to the designated dealers constituted interstate transportation. The vehicles in question were shipped from outside the state of Mississippi and, from the inception of the movement, were consigned to specific dealers in Mississippi and in other states. The mere fact that there was a change in the *mode* of transportation (from rail to truck) does not affect the interstate character of the transportation. The important fact is that the transportation was a continuous, pre-arranged movement from a point in one state to various pre-designated points in other states. Therefore, Complete Auto's operations were exclusively in interstate commerce.

II. It follows then that the privilege tax at issue in this case cannot be imposed on Complete Auto. This Court has uniformly held in numerous cases (*e.g., Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951)), that a state privilege tax is an impermissible direct burden on, and a forbidden regulation of, interstate commerce itself, since the privilege of doing interstate business is not subject to the sovereign power of the state. The constitutional infirmity of a privilege tax persists even if the tax is fairly apportioned and non-discriminatory.

III. The rule enunciated in *Spector* is supported by reason and principle and should be applied in this case. Taxes on interstate transportation should be subjected to careful scrutiny to insure that they do not burden interstate commerce, since strategically located states tend to exploit their geographical advantage by levying taxes on the transit of goods (as well as passengers and information) through the jurisdiction. While interstate commerce must pay its way, that does not justify the imposition of privilege taxes on interstate commerce, and particularly, on interstate transportation. Privilege taxes are more burdensome on interstate commerce than net income taxes, property taxes, or corporate franchise taxes, for two reasons. First, privilege taxes are traditionally directed at particular activities, such as transportation, rather than across-the-board at a large number of taxpayers. Second, privilege taxes on interstate transportation could be levied by numerous local taxing jurisdictions, while administration of the other taxes, with respect to interstate carriers, is most often conducted on a state-wide basis. The selectivity of a privilege tax makes it a vehicle by which a taxing jurisdiction may levy a tax that would be largely borne by non-residents, rather than by residents, of the taxing jurisdiction. Thus, privilege taxes, unlike taxes on broad classes of taxpayers, are not subject to local political restraints. The large number of local taxing jurisdictions levying privilege taxes is significant because of (a) the increased administrative burden on taxpayers engaged in interstate commerce created by diverse regulation and (b) the decreased likelihood that taxes actually burdening interstate commerce would be litigated.

This Court's decision that state and local taxing jurisdictions do not have the power to levy a privilege tax on purely interstate commerce was based, at least in part, on the reasoning that such taxation, if it is to be permitted at

all, requires the adoption of one uniform plan or system of regulation. See *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851). Congress has recognized the necessity for such a uniform system of regulation, thus providing additional evidence that the prior decisions of this Court were and are correct.

IV. Finally, a departure from the established rule that a state may not levy a privilege tax on interstate commerce would create a tremendous burden on Complete Auto. In economic effect, a gross receipts tax is imposed on the consumer of the services, and the "taxpayer" is merely serving as a tax-collecting authority for the state. The effect of the departure from *Spector* would be to retroactively impose on Complete Auto the duty of acting as tax collector for the state, and then to penalize Complete Auto for not having performed the duty which it did not know and could not know that it was required to perform. Thus, there should be no change in the long-established rule that state and local jurisdictions have no power to impose privilege taxes on exclusively interstate commerce unless such change is initiated by Congress.

ARGUMENT

I. Complete Auto Was Engaged Solely in Interstate Commerce.

As noted above, this tax assessment was originally founded on the Tax Commission's position that Complete Auto was engaged in the business of *intrastate* transportation. Thus, the issue presented to the trial court in this cause was whether the activities of Complete Auto constituted interstate or intrastate commerce. We believe that any fair and unstrained reading of the opinion of the Chan-

cery Court, as well as the opinion of the Mississippi Supreme Court, shows that this question has been resolved in favor of Complete Auto. Both courts based their opinions on the position that the state could tax interstate commerce, recognizing (either explicitly or implicitly) that the activities of Complete Auto were interstate in character. Since, however, the Appellee has suggested, in its Motion to Dismiss or Affirm, that the transportation activities involved in this cause were intrastate in nature, we shall comment briefly on the authorities and facts which support the conclusions of the courts below that the activities of Complete Auto constituted interstate commerce.

The operative facts in this case are not in dispute (Opinion of the Chancery Court, App. 99). It is uncontradicted that the vehicles in question were shipped from outside of the State of Mississippi and, from the inception of the movement, were consigned to specific dealers in Mississippi and in other states. The mere fact that there was a change in the *mode* of transportation (from rail to truck) does not affect or diminish the interstate character of the transportation. Nor does the fact that the portion of the movement *by truck* occurred wholly within Mississippi convert the interstate movement to intrastate transportation. Likewise, the fact that additional shipping documents were necessitated by the change in the mode of transportation is wholly irrelevant.[5]

The important fact is that the transportation was a continuous, pre-arranged movement from a point in one state to various pre-designated points in other states; as such, the essential character of the transportation was, and at all times remained, interstate commerce.

---

5. Separate documents were prepared for the rail and truck portions of the movement because the carriers had not filed joint rates with the Interstate Commerce Commission (App. 69, 72-73).

The foregoing principles are abundantly supported by both reason and precedent.

Illustrative of the many decisions of the United States Supreme Court on this point is *Western Oil Refining Company* v. *Lipscomb*, 244 U.S. 346, 348-49 (1917) wherein this Court stated:

> Unlike Gulf, C. & S. F. R. Co. v. Texas, 204 U.S. 403, 51 L.Ed. 540, 27 Sup. Ct. Rep. 360, this is not a case where, at the time of the original billing, the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier which rightly conformed its action to what was said in the bill of lading. *On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated,* and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, *and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. . . .* (Emphasis added.)

Explicitly basing its holding on the decisions of this Court, the Mississippi Supreme Court has heretofore held that every part or link of a continuous passage from a point in one state to a point in another state is interstate commerce, even though a particular part of the carriage is

entirely within the limits of one state, and even though the carriers are separate and independent, with no joint traffic arrangement. *American Express Company* v. *Miller*, 104 Miss. 247, 249-250, 61 So. 306, 307 (1913). See also *United States* v. *Yellow Cab Company*, 332 U.S. 218, 228-229 (1946).

Likewise, the continuity and the interstate character of an interstate shipment are not affected by changes in, or by the form of, the bills of lading, or by changes in the method or means of transportation. *Minnesota* v. *Blasius*, 290 U.S. 1, 9-10 (1933).

Thus, the interstate character of this transportation is established by the following clearly proven facts: the intention of General Motors was to ship the motor vehicles from the place of manufacture in one state to various designated dealers located in other states; the only break in the shipment of the motor vehicles was for the purpose of loading the motor vehicles from the railroad cars to the trucks; and the transportation of the motor vehicles continued to the designated dealers.

Accordingly, it is clear that the Mississippi courts were correct in characterizing the transportation at issue as interstate commerce.

II. The Prior Decisions of This Court Hold That a State Cannot Levy a Privilege Tax on Interstate Commerce.

It is undisputed that the tax at issue in this case is a privilege tax on doing business. The statute clearly states that the tax is on the privilege of doing business; neither the statute nor the opinions of the courts below purports to place the tax on any "local incident" of Complete Auto's business. Moreover, the Tax Commission does not contend that Complete Auto engages in any activities in the State of Mississippi, other than the transportation activities at issue

here, which would subject it to payment of this Mississippi privilege tax. Finally, both courts below have concluded that the transportation activities of Complete Auto Transit, Inc. involved in this case constitute interstate commerce.

However, both the Chancery Court and the Mississippi Supreme Court determined that, notwithstanding the fact that the transportation constituted interstate commerce, Mississippi could levy a privilege tax thereon so long as no other state could duplicate the tax involved and thereby impose cumulative burdens. We contend that that conclusion is manifestly erroneous and in direct conflict with the prior decisions of this Court.

This Court has repeatedly held that a state cannot levy a tax on the *privilege* of engaging in exclusively interstate commerce, whether or not the tax is fairly apportioned to the activities conducted within a state.

Taxes imposed upon the privilege of carrying on interstate commerce, regardless of the amount of the tax, have uniformly been held obnoxious to the Commerce Clause on the ground that the privilege is given by the national, and not by the state, government. This Court has said that "No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce." *Atlantic and Pacific Tel. Co.* v. *Philadelphia*, 190 U.S. 160, 162 (1903). Similarly, "Any such excise burdens interstate commerce and is therefore invalid, without regard to measure or amount." *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, 217 (1925).[6]

---

6. Since the privilege of engaging in interstate commerce is given by the national government, and not by the state government, a state-imposed privilege tax is an attempt to exact compensation without providing any benefit in return. This Court has consistently held that the "privilege" of engaging in interstate commerce cannot be granted or withheld by a state. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1958).

State taxes other than privilege taxes may be imposed on interstate commerce, provided they do not constitute an undue burden and are non-discriminatory. However, a state privilege tax is an impermissible direct burden on, and a forbidden regulation of, interstate commerce itself, since the privilege of doing interstate business is not "subject to the sovereign power of the state." *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 609 (1951). Therefore, the constitutional infirmity of a privilege tax persists even if the tax is non-discriminatory. *Id.* at 608-609.

Spector involved facts very similar to those presented in the case at bar. The issue in *Spector* was the validity of the Connecticut business tax which required corporations "carrying on business in this state" to "pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state," amounting to 2% of the net income attributable to business transactions within the state. Spector, a Missouri corporation with headquarters in Illinois, was engaged in the interstate transportation of freight by motor truck. For full truckload pick-ups and deliveries in Connecticut, Spector's over-the-road trucks went directly to the customer's place of business. Where less than truckload shipments were involved, pickup trucks operated by Spector gathered the freight from customers for assembly into full truckloads at either of two terminal facilities in Connecticut.

The *Spector* Court noted that the tax did not discriminate between interstate and intrastate commerce, nor did it place an unduly heavy burden on interstate commerce. Nevertheless, the Court held the tax invalid, reasoning that the power to levy a tax on the privilege of doing interstate business was vested exclusively in the federal government, and the states retained no power to subject interstate commerce to such a tax.

> In this field there is not only reason but long established precedent for keeping the federal privilege of carrying on exclusive interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—M'Culloch v. Maryland [17 U.S. (4 Wheat.) 316 (1819)].

340 U.S. at 610.

Spector was reaffirmed in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). *Northwestern* sustained the application of a state *net income tax* to revenues of a corporation engaged in interstate commerce, where the tax was properly apportioned to the local activities within the state. The Court specifically noted that *Northwestern* was not a privilege tax case, and then stated:

> It is also contended that *Spector* . . . requires a contrary result. But there it was repeatedly emphasized that the tax was "imposed upon the franchise of a foreign corporation for the privilege of doing business within the State . . . ." Thus, it was invalid under a long line of precedents . . . . It was not a levy on net income but an excise or tax placed on the franchise of a foreign corporation engaged "exclusively" in interstate operations. . . . The taxes here, like that in West Publishing Co. v. McColgan . . ., are based only upon the net profits earned in the taxing State. That incidence of the tax affords a valid "constitutional channel" which the States have utilized to "make interstate commerce pay its way." In *Spector* the incidence was the privilege of doing business, and that avenue of approach had long been declared unavailable under the Commerce Clause.

358 U.S. at 463-64.

The rule enunciated in *Spector* was reiterated in *Railway Express, Inc.* v. *Virginia,* 347 U.S. 359 (1954) (*Railway Express I*) in which the Court invalidated a license tax imposed expressly "for the privilege of doing business in this state," 347 U.S. at 361 n.5. It was only after the Virginia statute was modified, so as to impose the tax on the taxpayer's property rather than on the privilege of doing business, that it was able to withstand constitutional attack. See *Railway Express, Inc.* v. *Virginia,* 358 U.S. 434 (1959) (*Railway Express II*).

The holdings of *Spector* and *Railway Express I* were recently concisely summarized in *Colonial Pipeline* v. *Traigle,* 421 U.S. 100, 112 (1975), where this Court stated:

> Spector held invalid under the Commerce Clause a Connecticut tax based expressly "upon [the corporation's] franchise for the privilege of carrying on or doing business within the state . . . ." Similarly, Railway Express I invalidated Virginia's "annual license tax" imposed on express companies expressly "for the privilege of doing business" in the State. Thus both taxes, as express imposts upon the privilege of carrying on an exclusively interstate business, contained the same fatal constitutional flaw. . . .

It is clear that the Mississippi statute at issue in this case contains the "same fatal constitutional flaw" that was found in *Spector* and in *Railway Express I.* Furthermore, it was only by repealing and eliminating this "unconstitutional basis" for the tax that Louisiana was able to enact a corporate franchise tax statute that would pass constitutional muster. The earlier Louisiana statute discussed in *Colonial Pipeline* had levied the tax "for the privilege of carrying on or doing business . . . in this state." 421 U.S. at 102. After the earlier statute was declared unconstitutional by a Louisiana court, the Louisiana Legislature

amended the statute there involved by providing for three "alternative incidents" on which the tax might be imposed, 421 U.S. at 103-04. It was the revised form of the statute that the Court upheld in *Colonial Pipeline.*[7]

Despite the fact that the taxing statute involved in this case is virtually identical to the earlier, unconstitutional Louisiana statute and to the statutes held invalid in *Spector* and *Railway Express I,* the Mississippi Supreme Court has held in the present case that the privilege tax upon a purely interstate business is valid "so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states." (App. 111). The Mississippi Supreme Court relied on the theory enunciated in the plurality opinion of *Interstate Oil Pipeline Co.* v. *Stone,* 337 U.S. 662 (1949). *Interstate Oil Pipeline,* however, predated *Spector.* The *Spector* opinion (written by Justice Burton, whose separate concurrence provided the 5-4 majority for the result in *Interstate Oil Pipeline*) clearly limited the plurality opinion in *Interstate Oil Pipeline* to its facts and repudiated its reasoning. See 340 U.S. at 609-610. Moreover, the theory adopted by the Mississippi Supreme Court in the present case (relying on the plurality opinion of *Interstate Oil Pipeline*) is exactly the same theory rejected by this Court in *Spector, Railway Express I,* and *Colonial Pipeline.*

It is unusual for a state appellate court to do as the Mississippi Supreme Court has done in steering a course so clearly prohibited by the decisions of this Court. There

---

7. The opinion in *Colonial Pipeline* relied heavily on *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80 (1948). *Memphis Natural Gas* involved a Mississippi corporate franchise tax. We note that for all relevant years Complete Auto paid the Mississippi corporate franchise tax, as well as substantial Mississippi corporate income taxes, ad valorem taxes, and license plate fees. Exhibit C-5, App. 91, 92.

is not even a semblance of an attempt to reconcile the Mississippi decision with this Court's holdings. Rather, there is a naked assertion of the power to place a tax on the privilege of conducting a purely interstate business. We submit there is no basis on which the Mississippi Court's decision can be reconciled with the prior decisions of this Court in *Spector*, *Railway Express I*, or *Colonial Pipeline*, or with the principles on which those decisions were based.

III. The Rule Announced in the Prior Decisions of This Court Is Supported by Both Reason and Principle.

The foregoing discussion of the prior decisions of this Court makes clear that *Spector*, and the other cases cited, preclude imposition of this privilege tax on Complete Auto. That should end the argument. However, in the light of the questions as to the soundness of *Spector* raised by two Justices of this Court in the concurring opinion in *Colonial Pipeline, supra*, 421 U.S. at 113-16, we believe it appropriate to point out that Complete Auto's position is supported not only by precedent but also by reason and principle.

A. State and Local Privilege Taxes Would Unduly Burden Interstate Commerce.

The reference in *Spector* to *M'Culloch* v. *Maryland* makes it clear that *Spector* was based squarely on the proposition that certain subjects of taxation have been constitutionally excluded from the ambit of state taxing power because of the danger that the exercise of such taxing power by states, municipalities, and other local governmental entities would frustrate the basic constitutional premise that the United States is one integrated economic unit.

The Constitutional Convention was originally assembled in Philadelphia, following the Annapolis conference, in an effort to end the restrictions imposed on commerce by the various states' "retaliations, discriminations, and every manner of trade restrictions and impediments which local ingenuity and selfishness could devise." See generally A. Beveridge, I The Life of John Marshall, 310-11 (1916).

The concept that the several states constitute one economic unit necessarily requires that the flow of trade among the states be subject to no unnecessary state-imposed impediments. Particularly, state taxes on transportation should be and must be subject to careful scrutiny to ensure that they impose no unnecessary burdens on interstate commerce. The potentially destructive nature of state taxes on the transportation of goods in interstate commerce has long been recognized. See, for example, the dicta of Chief Justice Marshall in *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827), which clearly assumes the unconstitutionality of state taxes on the transit of goods through the state. See also Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219 (1957).

The danger, of course, is that strategically located states will exploit their geographical advantage by levying taxes on the passage of property through the jurisdiction.

> As Professor Brown points out:
> For these purposes it matters not whether the exaction is a tariff or a toll on the entrance of goods, or a tax on transportation. In fact, if a port area is involved, the tax on transportation may well lie more heavily upon consumers in the hinterland, who depend upon transit through and beyond the ports. The tariff or toll on entrance will fall upon the people of the port

areas as well as those beyond, and this may well exert a moderating influence in its imposition. But the tax on transportation falls only on those in remoter areas beyond the port and, accordingly, may tend to rise to the level of what the traffic will bear.

. . . As through traffic equals, exceeds or predominates over local in any jurisdiction—port, passage, city, county or state—a tax on transport, apportioned with whatever show of fairness one desires, can clearly be imposed at diminishing relative costs to the local taxpayers and voters. Outsiders with no voice in the determination of the tax will bear an increasingly large share of the burden. This is a cheap and domestically attractive way to finance a government, where opportunity offers. . . .

Brown, *supra*, 67 Yale L.J. at 229.

The holdings in *Spector, Railway Express I*, and *Colonial Pipeline* were not limited to privilege taxes levied on the business of engaging in interstate transportation, although each of the cases did involve interstate carriers. However, because of the tendency of strategically located taxing entities to enact a toll for passage through their territory, taxes imposed on the transportation of goods, passengers or information (communications) have historically presented the greatest danger to the free flow of trade. The particular scrutiny to be given taxes on interstate transportation was discussed in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 433-34 (1947), where the Court stated:

> Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause.

Thus, privilege taxes on interstate *transportation* are and should be subject to greater scrutiny than privilege taxes imposed on other activities.

Of course, it is far too late in the day to argue that this Court should invalidate all state taxes on interstate transportation and communications. All taxes are not destructive of free trade; interstate commerce must pay its way. States are entitled to compensation for the services they render to interstate commerce. While we do not quarrel with the proposition that interstate business should pay the costs of the government benefits it receives, we do contend that this proposition does not justify state and local imposition of *privilege* taxes on interstate commerce.

It is impossible to precisely compute and allocate the cost of providing state benefits to taxpayers engaged in interstate commerce. Certainly, the courts are not well-suited to make such economic determinations. Thus, the best way to achieve some degree of equity between cost and benefit is to require that non-residents be afforded equal treatment with residents of the taxing jurisdiction. In the absence of national restraints imposed by Congress

or by the courts, the only possible restrictions on local abuse of the taxing power are local political checks imposed by the residents of the taxing jurisdiction. For the reasons discussed below, however, privilege taxes upon interstate transportation and communications are not subjected to political restraints imposed by local voters. Thus, we submit that *privilege* taxes upon the transportation of goods (and passengers, as well as the transportation of information) in interstate commerce present far greater problems than those taxes which the Court has previously upheld.

For example, the Court in *Northwestern Portland Cement Company, supra,* upheld a net income tax on interstate commerce. Presumably, *Northwestern* is fully applicable to a taxpayer engaged in the transportation of goods in interstate commerce, as well as to sales of goods. However, there are sound constitutional reasons for sustaining a net income tax (as in *Northwestern*) while prohibiting the imposition of a state or local privilege tax (as in *Spector* and *Railway Express I*).

First, with few exceptions, net income taxes are generally levied by states, rather than by counties or municipalities or other local taxing authorities; thus the diversity of local taxation does not pose as great an administrative burden on taxpayers. Moreover, the smaller number of taxing jurisdictions, and the greater amount of taxes each would levy, makes it more likely that taxes which discriminate against interstate commerce will in fact be litigated, rather than paid by the carriers.

Second, net income taxes are generally applicable across-the-board to taxpayers engaged in all occupations, rather than directed just at transportation or at other aspects of interstate commerce. On the other hand, privilege taxes are often directed at particular activities, such

as transportation and communications.[8] Thus, because of its selectivity, there is a greater opportunity and probability that a privilege tax would be manipulated to the advantage of local residents and to the disadvantage of interstate carriers, shippers and non-resident consumers.[9]

Likewise, fairly apportioned ad valorem taxes on property used in or moving in interstate commerce do not present the same dangers as a privilege tax. Property taxes are by their nature assessed on a broad class of property, rather than only on property used in interstate commerce, thus diminishing the likelihood that such a tax will materially act to the advantage of local residents at the expense of non-residents. Moreover, property taxes on moving equipment of interstate carriers, and on the property of utility and communications taxpayers, are often assessed pursuant to a uniform statewide system, rather

---

8. See the numerous exceptions and exemptions to the Mississippi sales tax statute involved in this case, Sections 27-65-1 through -29, Mississippi Code of 1972, Annotated, Vol. 9, pages 4-38 (formerly codified as Sections 10103 *et seq.*, Mississippi Code of 1942). For example, Section 27-65-29 (d)(1) (prior to amendment by Mississippi Laws 1972, Chapter 506, note 1 *supra*) exempted from the tax any amounts received for the intrastate transportation of commercial fertilizers, asphaltic or Portland cement, wood chips, chlorine, seafoods, natural resources and products of the forest, farm, grove or garden in the original condition or state of preparation for sale.

In addition, the Mississippi state and local privilege taxes occupy 191 *pages* of one volume of the Code, and include, among others, diverse special privilege taxes for those doing business as telephone and telegraph companies, railroad companies, sleeping car companies, express companies, pipeline companies, transient vendors or dealers, cotton buyers, horse and mule auctioneers (separate rates for residents and non-residents) and Gypsies. See generally Sections 27-15-1 through -251 and 27-17-1 through -521, Mississippi Code of 1972, Annotated, Vol. 7, pages 502-693 (formerly codified as Section 9427 *et seq.*, Mississippi Code of 1942).

9. Cf. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 34, 45 n.2 (1940).

than separately by each taxing jurisdiction in the state.[10] Thus, for the reasons set out in the preceding paragraphs—application to a broad class of taxpayers, and administration by a limited number of taxing jurisdictions—property taxes are less likely to burden interstate commerce than are privilege taxes. And similarly, for these same reasons, corporate franchise taxes are less likely to burden interstate commerce than privilege taxes on doing business.

Further, in the absence of a clear rule as to the validity *vel non* of a state's or local municipality's privilege tax levied on a taxpayer engaged in interstate commerce, a carrier would be required to prove that the tax either discriminated against or unduly burdened interstate commerce. This would not be a light burden for a carrier to undertake; nor are the standards to govern judicial scrutiny of such taxes susceptible to easy application by the courts. Often expediency would require that a carrier acquiesce in the unconstitutional tax provisions of the multiple jurisdictions through which it passes rather than pursue its expensive, time-consuming, and uncertain remedies in the courts.

Thus, there is much more to the distinction between net income taxes and privilege taxes (however measured) than a "mere matter of form." Rather, *Spector* and *Northwestern* together recognize that, although in some instances the two taxes *may have* similar economic impact, that similarity of economic effect is not inevitable. Given the propensity of geographically advantaged jurisdictions to favor

10. See, for example, the procedure used in *Braniff Airways* v. *Nebraska Board of Equalization*, 347 U.S. 590 (1954). Mississippi has similar statewide assessment procedures for many utilities and carriers. See generally Section 27-35-301 through -711, Mississippi Code of 1972, Annotated, Vol. 8, pages 380-403 (formerly codified as Sections 9825 *et seq.*, 9837 *et seq.*, and 9853-01 *et seq.*, Mississippi Code of 1942).

local interests at the cost of interstate transportation, such similarity of effect is not even probable. Instead, a privilege tax gives states, as well as cities and counties, a vehicle to levy a tax that will be borne to a much greater extent by non-residents than by residents. Thus, since local political considerations may not act as an effective restraint on privilege taxes burdening interstate commerce, and since Congress has relied upon existing jurisprudence and thus has not enacted any legislation to restrain such locally-imposed privilege tax burdens, this Court should not sanction the imposition of state and local privilege taxes on interstate commerce.

B. Congress Has Recognized and Relied Upon the Rule That a State May Not Tax the Privilege of Engaging in Interstate Commerce.

In 1959, this Court decided *Northwestern States Portland Cement Company* v. *Minnesota*, *supra*, which upheld the imposition of a net income tax on a company engaged in exclusively interstate commerce. As described in H.R. Rep. No. 2013, 89th Cong., 2d Sess. 2-3 (1966), Congressional reaction to *Northwestern* was prompt. Within weeks of the decision, the Senate Select Committee on Small Business began a series of public hearings. The hearings were followed by reports to the Senate urging (1) the enactment of a federal statute establishing a minimum standard restricting the imposition of state income taxes on interstate commerce and (2) the creation of a study commission to formulate proposals for uniform standards governing such taxes. As a result, Congress enacted Public Law 86-272, 73 Stat. 555 (1959).[11]

11. The full text of the Law is set out at Appendix B to this Brief.

Originally, both the minimum jurisdictional standard established by Public Law 86-272 and the study which the Law authorized were concerned only with state net income taxes. However, after this Court's decision in *Scripto, Inc.* v. *Carson*, 360 U.S. 207 (1960) (a use tax case), Congress enacted Public Law 87-17, 75 Stat. 41 (1961).[12] That statute broadened the scope of the study required by Public Law 86-272 so as to include "all matters pertaining to taxation of interstate commerce by the states . . . or any political or taxing subdivision. . . ."

As described in H.R. Rep. No. 1480, 88th Cong., 2d Sess. 9 (1964):

> Thus, in the year and a half between the decision in *Northwestern* and the broadening of the study which followed *Scripto*, Congress had for the first time exercised its power under the commerce clause to affect State taxation of multistate businesses, and in doing so had committed itself to assuming at least some portion of the responsibility which had hitherto been borne exclusively by the courts.

H.R. Rep. No. 1480 discusses specifically the inadequacy of the judicial process to resolve the problems of multistate taxation of interstate commerce, and alludes to the opinions of a number of the Justices of this Court who subscribed to the view that Congress was the most appropriate branch to deal with such problems.[13] Justice Frankfurter's views are typical of those discussed:

---

12. The full text of the Law is set out at Appendix C to this Brief.

13. The Report attributes this view to Justices Jackson, Rutledge, Black, Frankfurter, Douglas, and Clark. H. Rep. No. 1480, *supra*, at 19.

> At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power. Congressional committees can make studies and give the claims of the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency.

Northwestern, supra, 358 U.S. at 476-77 (dissenting opinion).

Accordingly, it is clear that Congress, through passage of Public Law 86-272, as amended by Public Law 87-17, has recognized the need for uniform standards in this area

and has undertaken a comprehensive study of all matters pertaining to the taxation of income derived from interstate commerce, and privilege taxes generally.[14]

The results of that study are contained in four volumes: H.R. Rep. 1480, 88th Cong., 2d Sess., 2 vols. (1964); H.R. Rep. 565, 89th Cong., 1st Sess. (1965); H.R. Rep. 952, 89th Cong., 1st Sess. (1965). The study, and the proposed legislation based thereon, are summarized in H.R. Rep. No. 2013, 89th Cong., 2d Sess. (1966).

Additional hearings were held on proposed legislation in 1966,[15] and in 1973.[16] The House passed Bills dealing with the subject in 1968,[17] and in 1969;[18] both proposals, however, died in the Senate. Congressional study has continued, and S.B. 2080, 94th Cong., 1st Sess. (1975) (introduced but not adopted during the last Congress) is one of several recent Congressional attempts to begin to create a system that reconciles the states' need for revenue with the federal interest in unimpeded interstate commerce.

---

14. While the study as prepared, as well as most of the subsequently proposed legislation, was directed specifically at the problems of companies marketing goods in more than one state, and not primarily at the transportation industry, H.R. Rep. No. 2013, *supra*, at 4, indicates that data collected substantiated the need for further evaluation of problem areas not covered by the proposed legislation, such as transportation. See also H.R. Rep. No. 952, *supra*, at 1138, which recommends that the Secretary of the Treasury determine if there is a need for legislation with respect to the interstate problems of companies engaged in transportation and other specified businesses.

15. Hearings on H.R. 11798 Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 89th Cong., 2d Sess. (1966).

16. Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Finance Comm., 93d Cong., 1st Sess. (1973).

17. H.R. Rep. 2158, 90th Cong., 2d Sess. (1968), see 114 Cong. Rec. 14,432-33 (1968).

18. H.R. Rep. 7906, 91st Cong., 1st Sess. (1969), see 115 Cong. Rec. 17,323 (1969).

In the light of the expressed Congressional intention that these complicated matters may best be resolved by federal legislation, this Court should not allow the State of Mississippi to interfere with the well-established and long-existing precedents upon which the Congressional study is based. Congress has taken cognizance of the existing pattern of state taxation of interstate transportation, including the limitation on state power imposed by the principle recognized in *Spector*. It is clear that Congress finds the existing accommodation of competing state and federal interests acceptable, pending a full and complete resolution of the questions surrounding state taxation of interstate commerce by Congress.

The principle that the states are without power to withhold or tax the privilege of engaging in interstate commerce is based at least in part on the principle that such taxation, if it is to be permitted at all, requires the adoption of one uniform (and thus federally-sanctioned) plan or system of regulation. See *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851). The discriminations and uncertainties that would arise from multitudinous and diverse privilege taxes levied by states, counties, cities, towns, districts, and villages throughout the country would undoubtedly burden interstate commerce. Public Law 86-272 was no doubt enacted with the intent of avoiding multiple and conflicting state regulations. Viewed in that context, the adoption of Public Law 86-272 strongly suggests that the states and local governments should not be allowed to expand their historic taxing jurisdiction so as to place privilege taxes on interstate carriers without congressional consent and regulation. It is clear that Congress viewed Public Law 86-272 as a stop-gap measure, pending more complete congressional legislation.[19] Accordingly, preservation of the *status quo* as to

---

19. See H.R. Rep. No. 2013, *supra*, at 8.

the privilege tax issue is clearly consistent with and carries out the general purpose of the federal statutes.

The holding of this Court in *Spector* that the states have no power to levy privilege taxes on interstate commerce was enunciated long before Congress (through Public Laws 86-272 and 87-17) legislatively recognized the need for federal guidelines and standards to govern the exercise of state power over interstate commerce. That Congress has now made such a determination is additional evidence that the Court's prior decisions were and remain correct.

Indeed, in view of the firmly-established principle that a state has no power whatsoever to levy a privilege tax on interstate commerce, and Congress' long acceptance thereof, this Court might well conclude that the states, if they ever had such power, are now preempted from exercising it unless Congress authorizes them to do so. Of course, a decision under the preemption doctrine would necessarily involve consideration of many of the same interests which originally prompted this Court to declare that the states had no power in this area whatsoever. As one commentator has noted,

> [W]hen the question is one of the negative implications of some affirmative constitutional grant of power, such as that over commerce, the view Congress takes of the permissible limits of state action is a proper concern to the court.

Note, *Preemption As a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208, 225 (1959).

In sum, Congressional recognition of the necessity for uniform standards in this area supports the prior decisions of this Court which have held that states have no power to levy privilege taxes on interstate commerce.

IV. Complete Auto Would Be Severely Prejudiced by a Retroactive Imposition of Taxes.

A decision by this Court that states now have (and have had) the power to impose a privilege tax on carriers in exclusively interstate commerce would seriously prejudice Complete Auto. The imposition of such taxes could not have been anticipated by Complete Auto, in view of the rule enunciated by this Court in *Spector* and reiterated by this Court as recently as 1975 in *Colonial Pipeline*. Thus, Complete Auto has had no opportunity or occasion to pass the tax on to the consumer, usually the ultimate bearer of a gross receipts tax. Moreover, it should be noted that the tax involved in this case is a tax on gross income—a tax which bears no relationship to net income or net profits, and which, if not passed on to the consumer in one form or the other, might well in many cases exceed the net profit from the operations. Had Complete Auto known that it was constitutionally subject to a privilege tax of the type at issue here, it would no doubt have collected it from General Motors (App. 89). Indeed, Section 10117, Mississippi Code of 1942 (now codified as Section 27-65-31, Mississippi Code of 1972, Annotated, Vol. 9, pages 39-40)[20] required the persons liable for the tax to add the amount of the tax to the gross charge for the services and to collect that amount from the purchasers of the services. In economic effect, the tax is imposed on the consumer of the services, and the "taxpayer" is merely serving as a tax-collecting authority for the state. Thus, the effect of a decision by this Court to depart from its holding in *Spector* would be to retroactively impose on Complete Auto the duty of acting as tax collector for the state, and then to penalize the carrier for not having performed the duty which it

---

20. The full text of the Section is set out at Appendix D to this Brief.

did not know it was required to perform. While there may be theoretical distinctions between an *ex post facto* legislative enactment and a judicial decision which changes existing constitutional standards, the two procedures would have the same practical effect in this case—a retroactive change in the tax-collecting responsibilities of interstate carriers.

H.R. Rep. No. 565, *supra*, at 636-637 discusses the various unpalatable alternatives facing a taxpayer who is uncertain as to whether he is required to collect a sales tax. The House Report points out that if the taxpayer does not collect the required taxes from his customers the result is often

> that the seller may have to pay the tax out of his own pocket and thus incur what is in effect a 100% penalty. For unlike the case of income tax delinquency and unlike the case where the buyer is required to remit a tax on his own past purchases, the delinquent seller-collector is required to assume a liability which was not his to begin with.

H.R. Rep. No. 565, *supra*, at 637.

On the other hand, the House Report also points out the near impossibility of collecting such a tax if the taxpayer's competitors are not collecting it from their customers. Certainly, that is the case here, when the entire industry was relying on *Spector* and *Railway Express I*. The State Tax Commission had made no effort to apply the privilege tax statute to Complete Auto prior to the commencement of the audit giving rise to this assessment. Moreover, this assessment was originally based on the Tax Commission's position that Complete Auto was engaged in intrastate commerce. Indeed, the record in this case shows that the State Tax Commission has only come

belatedly, and alternatively, to its contention that it has the power to levy this tax *even though* Complete Auto's activities were interstate transportation.

Unless the decision of the court below is reversed, each state with a privilege tax applicable to transportation could contend that every interstate carrier is (and has been) subject to the tax. The tax burden could be enormous, and its effect would be all the more overwhelming since it could be imposed retroactively to the extent permitted by the applicable statute of limitations. Moreover, if under state law the statute of limitations did not start running until the filing of a return, the tax might be imposed retroactively for an indeterminate period, since undoubtedly many interstate carriers, in reliance on this Court's holding in *Spector*, have not filed the required tax returns.

Since in many instances it will be impossible or impracticable to collect taxes from customers for prior years, the cost of the taxes assessed would be borne by the carriers or by their current customers. That cost would place a substantial burden on interstate commerce generally, since the tax would affect the carriers' operations and their customers system-wide, not only in taxing states but in other states as well.

For the reasons hereinabove stated, Complete Auto, and most other interstate carriers, are opposed to state and local privilege taxes. Complete Auto's opposition to the State Tax Commission's attempt to collect this tax, however, is not based solely on a reluctance to pay such taxes *in the future*. Rather, Complete Auto is also opposed to a retroactively effective repudiation of the constitutional principles on which it has relied in paying its taxes. The State of Mississippi's attempt, at this late date, to assert authority to levy a privilege tax on interstate commerce violates the

principles of fair play and reasonable notice, as well as the general notion of due process.

The hardship that would result from a judicial alteration of the existing constitutional standards, however, would not necessarily result from Congressional action permitting such taxes. If such taxes are to be permitted at all, Congressional action applied prospectively could provide for an orderly transition to the uniform jurisdictional standards thus legislatively established, and would prevent a haphazard flurry of assessments for back liability.[21]

Thus, for this additional reason, as well as the reasons enunciated above, this Court should defer to Congressional iniatives, rather than abandoning the principle enunciated in *Spector*, *Railway Express I*, and *Colonial Pipeline*.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

21. For example, Section 525 of the proposed Interstate Taxation Act, as described in H.R. Rep. No. 2013, 89th Cong., 2d Sess. 9 (1966) provides for an orderly transition to a federally-sanctioned uniform system of state taxation of interstate commerce. See also Section 354 of S.B. 2080, 94th Cong., 1st Sess. (1975).

APPENDIX A

Section 27-65-19, Mississippi Code of 1972, Annotated (recodification of Section 10109, Mississippi Code of 1942)

§ 27-65-19. Public utilities.

(1) Upon every person selling to consumers, electricity, current, power, portable water, steam, coal, natural gas, liquefied petroleum gas or other fuel, there is thereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of the business. Provided, however, that there is hereby levied, assessed and shall be collected a tax equal to one per cent of the gross income of the business when the electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel, is sold to or used by a manufacturer, custom processor or public service company for industrial purposes which shall include that used to generate electricity, to operate an electrical distribution or transmission system, to operate pipeline compressor or pumping stations or to operate railroad locomotives.

The one per cent industrial rate provided herein shall also apply when the electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel is sold to a producer or processor for use directly in the production of poultry or poultry products, the processing of milk and milk products, the processing of poultry and livestock feed, and the irrigation of farm crops.

This one per cent rate shall not apply to sales of fuel for automobiles, trucks, truck-tractors, busses, farm tractors or airplanes.

Upon every person operating a telegraph or telephone business for the transmission of messages or conversation between points within this state, there is hereby levied, assessed and shall be collected, a tax equal to five per cent of the gross income of such business, with no deduction or allowance for any part of an intrastate rate charge because of routing across a state line.

(2) Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business, except persons operating local transit busses shall be exempt from such tax; and upon persons operating taxicabs within municipalities and within four miles thereof, there shall be collected a tax equal to two per cent of the gross income of the business.

"Gross income" shall mean and include the gross receipts derived from the operation of a taxi terminal or cab operating company to include the gross receipts or charges of each and all vehicles operating from or through said central terminal.

APPENDIX B

Public Law 86-272

AN ACT

Relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—IMPOSITION OF MINIMUM STANDARD

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section—

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate

commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed—

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

Sec. 104. If ny provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

TITLE II—STUDY AND REPORT BY CONGRESSIONAL COMMITTEES

Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommend-

ing to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.

Sec. 202. The Committees shall report to their respective Houses the results of such studies together with their proposals for legislation on or before July 1, 1962.

Approved September 14, 1959.

[Public Law 86-272 was subsequently amended by Public Law 87-17 (set out in Appendix C to this Brief) and by Public Law 87-435, 76 Stat. 55 (1962); Public Law 88-42, 77 Stat. 67 (1963); and Public Law 88-286, 78 Stat. 166 (1964) (all of which extended the date for the report required by Section 202).]

APPENDIX C

Public Law 87-17

AN ACT

To amend Public Law 86-272 relating to State taxation of interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 201 of Public Law 86-272 (73 Stat. 556) is amended to read as follows:

"Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation of interstate commerce by the States, territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, or any political or taxing subdivision of the foregoing."

Approved April 7, 1961.

APPENDIX D

Section 27-65-31, Mississippi Code of 1972, Annotated (recodification of Section 10117, Mississippi Code of 1942)

§ 27-65-31. Seller to collect tax.

Any person liable for a privilege tax levied and assessed by sections 27-65-17, 27-65-19, 27-65-23 and 27-65-25 of Mississippi Code of 1972, shall add the amount of such tax due by him to the sales price or gross income, and, in addition thereto, shall collect, insofar as practicable, the amount of the tax due by him from the purchaser at the time the sales price or gross income is collected. However, the provisions of this section shall not apply to charges for communication services taxable under section 27-65-19, the rates for which were on January 1, 1952, subject to the jurisdiction of the Mississippi public service commission, except to the extent the rates of tax imposed were not included as a part of the cost of furnishing services in fixing rates and charges.

The commissioner is hereby authorized, in his discretion, to prescribe by rule or regulation, brackets or schedules by which the applicable tax shall be collected from the purchaser.

It shall be unlawful for any person, who is liable for a privilege tax levied by sections 27-65-17, 27-65-19, 27-65-23 or 27-65-25 of the Mississippi Code of 1972, to fail or refuse to add to the sales price and collect, insofar as practicable, the amount of tax due by him on each sale, except where the tax was included in the cost of furnishing service when said cost was a factor in the fixing of rates and charges.

The tax due under the provisions of this chapter, shall be computed and paid on gross income or gross proceeds of sales of the business, regardless of the fact that small unit sales may be within the bracket of one of the schedules which does not provide for the collection of the tax from the customer.

Nothing in this section with reference to the collection of the tax from the customer shall be construed to impair, abridge, alter, or affect the obligation of any contract in existence at the time it becomes effective.

When the tax collected for any filing period is in excess of the amount due, the total tax collected, including that in excess of the computed liability, shall be paid to the commissioner. This provision shall be construed with other provisions of the law and given effect so as to result in the payment to the commissioner of the total tax collected if in excess of the amount due when computed at the applicable rates.

Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars.

NOT ARGUMENT

Supreme Court, U. S.
FILED
DEC 18 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF THE APPELLEE

JAMES H. HADDOCK
JOE D. GALLASPY
WILLIAM N. LOVELADY, JR.
Post Office Box 1033
Jackson, Mississippi 39205
Counsel for Appellee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Question Presented 4

Statement of the Case 5

Summary of the Argument 7

Argument—

I. The Mississippi Sales Tax Was Not Placed Upon Appellant Solely for the Privilege of Engaging Exclusively in Interstate Commerce, but, Rather, for the Privilege of Performing Intrastate Activities Entirely Within the State of Mississippi 12

II. The Incidence of the Mississippi Sales Tax Is Not Upon the Privilege of Engaging Exclusively in Interstate Commerce but Rather Upon the Performing of Local Activities, Namely, the Sale and Performance of Transportation Services, Exclusively Within the State of Mississippi 18

III. Mississippi Sales Tax Levied on the Gross Receipts of Transportation Charges Received for Transporting Vehicles From a Consignor-Owner to Consignee, Both Within the State of Mississippi, Is Not an Invalid Imposition Upon Interstate Commerce Even If It Was a Continuation of an Interstate Movement 20

IV. The Mississippi Sales Tax Applied to Appellant's Business Activities Was Not Discriminatory, the Tax Cannot Be Duplicated by Another State, and the Burden of the Tax Was on the Mississippi Consumer of the Services 22

V. Cases Cited by Appellant As Support for Their Argument Are Inappropriate and Are Inapplicable to the Facts of the Present Case, but, in Fact, Directly Support the Contention of Appellee That the Intrastate Business Activities May Be Subject to the Mississippi Sales Tax 24

VI. The Mississippi Supreme Court Correctly and Accurately Found That the Tax Was Properly Levied and Did Not Violate the Commerce Clause of the Constitution of the United States (Art. I, § 8, Cl. 3) and Based Their Decision Upon the Following Cases 29

Conclusion 43

Table of Authorities

Cases

Central Greyhound Lines v. *Mealey*, 334 U.S. 653 (1948) 12

Colonial Pipeline v. *Traigle*, 421 U.S. 100 (1975) ..11, 27, 29

Convoy Company v. *Taylor*, 334 P.2d 772 (1959) ....9, 11, 14, ...15, 17, 20-21, 29-35

General Motors v. *Washington*, 377 U.S. 437 (1964) 11-12

International Harvester Co. v. *Evalt*, 329 U.S. 416 (1947) 20

Interstate Oil Pipeline Co. v. *Stone*, 337 U.S. 662 (1949) 9, 10, 11, 20, 21, 42

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) 21, 23

Maine v. *Grand Trunk R. Co.*, 142 U.S. 217 (1891) 11

Memphis Natural Gas Co. v. *Stone*, 335 U.S. 80 (1948) 20

Northwestern States Portland Cement Co. v. *Minn.*, 358 U.S. 450 (1959) 22

Railway Express, Inc. v. *Virginia*, 347 U.S. 359 (1954) (Railway Express I) 11, 28, 29

Spector Motor Service, Inc. v. *O'Connor*, 340 U.S. 602 (1951) 8, 11, 12, 19, 24, 25, 26, 27, 29

Standard Pressed Steel Co. v. *Washington Revenue Dept.*, 419 U.S. 560 (1975) 12

Stone v. *Dunn Brothers*, 224 Miss. 762, 80 So.2d 802 (1955) 10, 11, 15, 17, 21, 35-42

Western Livestock v. *Bureau of Revenue*, 303 U.S. 250 (1938) 22, 23

Constitutional Provisions and Statutes

Article I, § 8, cl. 3, Constitution of the United States ..2, 13

Mississippi Code of 1942—

Section 10121.1 1

Section 10105 ..... 2, 5

Section 10109(2) 3, 5, 23

Section 10117 3

Section 10146-06 23

Mississippi Code of 1972, Annotated—

Section 27-65-13 2

Section 27-65-19(2) 3

Section 27-65-31 3

Section 27-65-47 1

Section 27-76-11 23

Mississippi General Laws, 1972, Chapter 506 .....3, 5, 23

28 U.S.C. § 1257 (2) 2

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi (App. 106) is reported at 330 So.2d 268. The opinion of the Chancery Court of Hinds County, Mississippi (App. 99) is not reported.

JURISDICTION

This action was commenced in the Chancery Court of Hinds County, Mississippi, pursuant to Section 10121.1, Mississippi Code of 1942 (now codified as Section 27-65-47, Mississippi Code of 1972, Annotated, Volume 9, page 52) seeking a refund of privilege taxes assessed against appel-

lant Complete Auto Transit, Inc. The decree of the Chancery Court upholding the assessment was entered on August 6, 1974 (App. 102).

Upon timely appeal, the order of the Chancery Court was affirmed by the Supreme Court of the State of Mississippi, which held that the Mississippi sales tax statute was constitutionally valid as applied to Complete Auto Transit, Inc. The opinion and judgment (App. 106) of the Mississippi Supreme Court were filed on April 13, 1976.

The Notice of Appeal to this Court (App. 113) was filed in the Mississippi Supreme Court on June 9, 1976. This appeal was docketed on July 12, 1976. Probable jurisdiction was noted on October 4, 1976. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal is predicated upon the Interstate Commerce Clause of the Constitution of the United States (Art. I, § 8, cl. 3), which provides that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

The following statutes were in effect at all times relevant to this litigation and formed the basis for the assessment of the tax at issue.

Section 10105 of Mississippi Code of 1942 (now codified as Section 27-65-13, Mississippi Code of 1972, Annotated, Vol. 9, page 12), which reads as follows:

> There is hereby levied and assessed, and shall be collected, *privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections. (Emphasis added.)

Section 10109 (2), Mississippi Code of 1942 (codified as Section 27-65-19 (2), Mississippi Code of 1972, Annotated, Vol. 9, page 20), provided[1] in part as follows:

> Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire *between points within this State*, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent (5%) of the gross income of such business. . .[2] (Emphasis added.)

In addition to the statutes cited by the appellant, the following statute is also applicable. Section 27-65-31, Mississippi Code of 1972, Annotated (§ 10117, Mississippi Code of 1942), provides in part:

> Any person liable for a privilege tax levied and assessed by sections 27-65-17 [§ 10108, Mississippi Code of 1942], 27-65-19 [§ 10109, Mississippi Code of 1942], 27-65-23 [§ 10111, Mississippi Code of 1942] and 27-65-25 [§ 10112, Mississippi Code of 1942] of Mississippi Code of 1972, shall add the amount of

---

1. The statute was amended effective as of August 1, 1972, so as to exclude the transportation of property. Mississippi Laws 1972, Chapter 506. The statute as amended appears in Mississippi Code of 1972, Annotated, Supp. to Vol. 9, pages 14-15.

2. The full text of the statute is set out in Appendix A to this Brief.

such tax due by him to the sales price or gross income, and, in addition thereto, shall collect, insofar as practicable, the amount of the tax due by him from the purchaser at the time the sales price or gross income is collected. However, the provisions of this section shall not apply to charges for communication services taxable under section 27-65-19, the rates for which were on January 1, 1952, subject to the jurisdiction of the Mississippi public service commission, except to the extent the rates of tax imposed were not included as a part of the cost of furnishing services in fixing rates and charges.

* * *

It shall be unlawful for any person, who is liable for a privilege tax levied by sections 27-65-17, 27-65-19, 27-65-23 or 27-65-25 of the Mississippi Code of 1972, to fail or refuse to add to the sales price and collect, insofar as practicable, the amount of the tax due by him on each sale, except where the tax was included in the cost of furnishing service when said cost was a factor in the fixing of rates and charges.

QUESTION PRESENTED

The following question is presented by this appeal:

May the State of Mississippi levy a sales tax on intrastate waybills for services performed exclusively within the state even though the activity is related to or connected with interstate commerce?

STATEMENT OF THE CASE

This case involved an assessment for state sales taxes levied by the Mississippi State Tax Commission upon the appellant, Complete Auto Transit, Inc. The appellant, a Michigan corporation, had contracted with General Motors Corporation to haul certain motor vehicles from Jackson, Mississippi, to various General Motors dealers located within the State of Mississippi.

The State Tax Commission pursuant to its authority under Sections 10105 and 10109 (2), Mississippi Code of 1942,[3] made an assessment upon the gross receipts earned by the appellant corporation for transporting various vehicles from Jackson, Mississippi, to points within the State of Mississippi (App. 42).

The subject vehicles were initially shipped by rail from a General Motors assembly plant located outside of the State of Mississippi on a bill of lading naming General Motors as consignor and General Motors, in care of Complete Auto Transit, Inc., Jackson, Mississippi, as consignee. No sales tax was levied by the State of Mississippi upon this particular transportation activity.

The appellant maintained a yard adjacent to the railroad at Jackson, Mississippi, where the vehicles were stored and where an office, together with facilities for servicing the appellant's trucks were maintained (App. 78-79). Upon arrival at the Jackson, Mississippi, railhead ramp, the shipping documents were stamped "Received General Motors Corporation, by Complete Auto Transit" (App. 18-19, 23-24, 95-96). After inspection of the vehicles for dam-

---

3. Effective August 1, 1972, § 10109 (2) was amended to exclude the transportation of property. See General Laws of Mississippi 1972, Chapter 506.

age, the appellant prepared separate waybills showing General Motors, Jackson, Mississippi, as shipper and consignor, the description of the vehicles, and the name of the consignees (General Motors dealers in cities other than Jackson) (App. 18-19, 25-26, 67-68, 96).

The transportation contracts between General Motors and the railroad and between General Motors and the appellant were negotiated separately (App. 64, 68). The charges paid by General Motors to the appellant for the transportation of vehicles from Jackson, Mississippi, to various dealers within the state were readily separable from charges for transporting vehicles from Jackson outside the State of Mississippi. Likewise, the transportation charges paid the railroad company were in no way connected to those paid by General Motors to the appellant (App. 68).

The Mississippi State Tax Commission made no assessment upon the appellant for the transportation of motor vehicles from Jackson, Mississippi, to points outside of the state. Also, there was no tax levied upon the railroads for transporting the vehicles into Jackson from outside the State of Mississippi. The taxes that are at issue in this case were restricted to the transportation of motor vehicles from Jackson, Mississippi, to points within the State of Mississippi itself (App. 34-36). For the period August 1, 1968, through July 31, 1972, the Mississippi State Tax Commission assessed the appellant, Complete Auto Transit, Inc., sales taxes in the amount of $167,375.30 (App. 10, 12, 37).

The assessment at issue in this case was appealed to the Chancery Court of Hinds County, Mississippi, with a decree affirming the assessment being entered on August 6, 1974 (App. 99-103). On April 13, 1976, the Supreme

Court of the State of Mississippi in a unanimous decision affirmed the assessment (App. 106-111). The case is now reported at 330 So.2d 268.

SUMMARY OF THE ARGUMENT

I. General Motors shipped automobiles by rail on a bill of lading showing General Motors Assembly plant, Atlanta, Georgia, as consignor, to themselves, General Motors, Jackson, Mississippi, as consignee, in care of Complete Auto Transit.

No Mississippi sales tax was levied on the transportation charges for any part of that interstate rail shipment.

Complete Auto, the appellant herein, is a foreign corporation domiciled in Jackson, Mississippi, engaging in the business of transporting automobiles by truck on waybills showing General Motors, Jackson, Mississippi, as shipper, to a consignee-dealer located either in Mississippi or in a neighboring state.

The Mississippi Tax Commission levied a five percent sales tax on the gross receipts of the transportation charges received from their intrastate shipments, from General Motors as shipper in Jackson, Mississippi, to a dealer destination, also in Mississippi. *No tax was imposed on the interstate shipments going from Jackson, Mississippi, to a destination in another state.* No apportionment is therefore at issue.

The Mississippi sales tax law provides for the imposition of the tax on the gross receipts or gross income of the charges for the transportation service performed exclusively within the state.

The incidence of the sales tax is obviously the performance of the intrastate commercial activity since it is not due until the sale of the goods or service has been performed. It is the event which is the "incidence." If the event is not performed, no tax is due.

The sales tax is applied only to intrastate transactions performed totally and exclusively within the state. It is not a condition precedent to engaging in business; neither is it a license to engage in business.

It is obviously not a tax on the privilege of engaging solely in interstate commerce since no tax has been imposed on any of the appellant's interstate shipments or any part of his receipts from that portion of his business. The tax has been imposed only on the exclusively intrastate commercial activity of transporting between points within this state in direct competition with intrastate transporters. The tax was imposed only on transportation services for which he needed no interstate permit to perform.

The tax was applied to everyone alike for performing the identical intrastate activity. It is fair, just, not discriminatory, and may not be repeated by another state.

The Mississippi sales tax law limits the imposition of the tax to exclusively intrastate transactions and therefore the issue presented to the United States Supreme Court in *Spector Motor Service* is not the same, even though both the majority and dissenting opinions support the position of the appellee in the present case.

The intrastate activity, which the Court looked for but could not find in the *Spector* case, is the total activity taxed in the present case.

The question presented in this case is obviously not the question posed by the appellant: "May the State impose a privilege tax upon the appellant solely for the privilege of engaging exclusively in interstate commerce." The facts in the case do not even approach such a question for the following reasons:

First, the Mississippi sales tax is imposed for having performed a taxable event and does not accrue until the event has been conducted.

Second, it is not a condition precedent to engaging in business.

Third, the tax is imposed only on exclusively intrastate commercial activities.

Fourth, the tax has not been imposed upon the appellant for any part of his interstate transportation services.

The sales tax levied against the appellant is in full accord with the principles established by the Supreme Courts of the State of Mississippi and the State of Washington, and the Supreme Court of the United States.

It is the contention of the appellee that the sales tax was imposed on activities of the appellant which were in intrastate commerce, since the interstate commerce had terminated at the destination of the out-of-state shipment.

The Supreme Court of the State of Washington in *Convoy* v. *Taylor*, 334 P.2d 772 (1959), in an identical case decided that the tax was properly levied and not violative of the Commerce Clause of the Constitution of the United States because it was a tax on intrastate commerce, *but even if there was a continuation of interstate commerce, the tax was proper since it was a tax on a local intrastate activity performed exclusively within that state*, and the Court cited the opinions and decisions of the Mississippi Supreme Court and the United States Supreme Court in *Interstate Oil Pipeline Co.* v. *Stone*, 337

U.S. 662 (1949), which involved local intrastate activities prior to the actual interstate shipment, and the case of *Stone* v. *Dunn Brothers,* 224 Miss. 762, 80 So.2d 802, Suggestion of Error Overruled, 350 U.S. 878 (1955), which is identical in principle to the case before this Court, which involved the imposition of the sales tax to an intrastate commercial activity at the end of the interstate movement.

In the *Interstate Oil Pipeline* case, Mr. Justice Rutledge speaking for the majority, said that it was not necessary to determine whether the appellant was engaged in interstate or intrastate commerce, because the state had the right to levy the tax anyway since it was imposed upon an exclusively intrastate, local activity, that it was fair, was not discriminatory, and could not be duplicated by another state. Mr. Justice Rutledge stated as follows in *Interstate* at 337 U.S. 666, 668:

"We do not pause to consider whether the business of operating the intrastate pipe line is interstate commerce, for even if we assume that it is, Mississippi has power to impose the tax involved in this case.

* * *

"Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax."

II. The appellant enjoys all of the rights and protection and privileges of the law afforded to all businesses. He uses the streets and highways of this state used by all transportation business alike. He is in direct competition with intrastate transporters for the business activity on which the sales tax was imposed. He needed no intrastate permit to perform this activity. The appellant had no intrastate permit because he never applied for one.

The appellant has based his sole support on the cases of *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951); *Railway Express, Inc.* v. *Virginia,* 347 U.S. 359 (1954) (*Railway Express I*); and *Colonial Pipeline* v. *Traigle,* 421 U.S. 100 (1975).

These cases may be easily and quickly distinguished from the case before this Court on the facts. The tax in each case was imposed on the sole activities of through interstate shipments. There was no local activity and therefore required an apportionment of the receipts, since they all involved a tax on interstate shipments, from a shipper in one state to a consignee in another state and was exclusively interstate commerce. The Court diligently sought the local intrastate activity in each but could not find it. They were engaged exclusively in the interstate shipments whereas in the present case, the local intrastate activity of the appellant is the only activity on which the sales tax was imposed.

The principles imposed by *Spector Motor Service, Inc., supra,* are not violated by the case at bar and the cases of *Convoy Company* v. *Taylor,* 334 P.2d 772 (Washington 1959); *Interstate Oil Pipeline* v. *Stone,* 337 U.S. 662 (1949); *Stone* v. *Dunn Brothers,* 224 Miss. 762, 80 So.2d 802, Suggestion of Error Overruled, 350 U.S. 878 (1955); *Maine* v. *Grand Trunk R. Co.,* 142 U.S. 217 (1891); *General Motors*

v. *Washington*, 377 U.S. 437 (1964); *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U.S. 560 (1975); *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948); in that the local activity which the Court sought and failed to find in *Spector* is present here and is the sole basis for the imposition of this tax.

If this Court should find that this sales tax imposed upon the local intrastate commercial activity is prohibited by the Commerce Clause of the Constitution of the United States, it would be providing an insurmountable advantage to interstate businesses who are in direct competition for the same business, and would discriminate against intrastate business, a situation never intended by the framers of the Constitution of the United States.

ARGUMENT

I. The Mississippi Sales Tax Was Not Placed Upon Appellant Solely for the Privilege of Engaging Exclusively in Interstate Commerce, but, Rather, for the Privilege of Performing Intrastate Activities Entirely Within the State of Mississippi.

The answer to the appellant's question presented to this Court may be answered easily from the facts alone. It is clear that the sales tax was not placed on the appellant solely for the privilege of engaging in interstate commerce but rather on the privilege of performing intrastate activities entirely within the State of Mississippi (App. 36).

The application of the Mississippi sales tax to the appellant's transportation charges for transporting vehicles from a shipper-owner, General Motors in Jackson, Mississippi, to a dealer also located within this state, did not violate the Interstate Commerce Clause of the Constitu-

tion of the United States (Art. I, § 8, cl. 3) for the following reasons:

The appellant's activity in Mississippi on which the sales tax was levied was an intrastate service between a point of origin and a point of destination, both of which are within the geographical boundaries of the State of Mississippi (App. 36).

Complete Auto Transit, Inc. (Complete Auto), is a Michigan corporation, engaged in transporting automobiles on waybills from General Motors in Jackson, Mississippi, as shipper, to automobile dealers both in Mississippi and surrounding states. It maintains an office, a manager, service facilities for servicing the transport trucks, and a sufficient number of personnel and transport trucks to support the business activity of handling, preparing shipments (App. 78-79), and transporting over 350 vehicles per day (App. 60-81), these facilities enjoying the full police protection of the State of Mississippi. Complete Auto holds an interstate permit (App. 32), but has no intrastate permit.[4] They could perform the intrastate activities in question here without an interstate permit and in which case the question of the burden on interstate commerce would not be presented to this Court. Complete Auto transports the vehicles on a bill of lading or waybill[5] (App. 19 and 25) which designates the shipper as General

---

4. Complete has never made an application for an intrastate permit (App. 75).

5. The only facts for consideration would be the waybill or shipping document on which the appellant transported property within Mississippi which clearly established the shipper as General Motors, Jackson, Mississippi, to a dealer also located in Mississippi, and no further need for even a consideration of any interstate question. The only pertinent fact for consideration is that General Motors, either directly or by agent, shipped merchandise from themselves in Jackson, Mississippi, to a dealer located in Mississippi.

Motors in Jackson, Mississippi, to a dealer destination either in Mississippi or in a neighboring state. No Mississippi sales tax was applied to shipments from Jackson, Mississippi, to a destination outside Mississippi. The Mississippi sales tax was applied only to the activities performed under waybills which are clearly *intrastate* services. It may also be noted that no sales tax was applied to the rail transportation on bills of lading or shipping documents from outside the state to General Motors in Jackson, Mississippi.

The automobiles are shipped into Mississippi by rail on bills of lading[6] which specify the consignor as General Motors Assembly Division, Atlanta, Georgia, to themselves as consignee in care of Complete Auto, Jackson, Mississippi; General Motors, of course, having complete control over the vehicles during this rail movement by virtue of being the consignor in Georgia and the consignee in Jackson, Mississippi, and until such time as they may ship the property from Jackson, Mississippi (App. 70) to a dealer either in Mississippi or in a neighboring state.[7]

The Mississippi sales tax has been applied to the gross receipts received by Complete Auto from the charges for the services performed in transporting vehicles from General Motors, Jackson, Mississippi, to a dealer located within the state as stated on the waybill covering the movement (App. 19 and 25). It is the application of the Mississippi sales tax to appellant's charges for performing this exclusively Mississippi business that the appellant contends violates the Commerce Clause of the United States Constitution.

---

6. Exhibit C-1(A) (App. 19-20).

7. See *Convoy Co.* v. *Taylor*, 334 P.2d 772 (Washington, 1959), for reason for handling shipments in this manner.

This is the same factual and legal situation decided by the Supreme Court of the State of Washington in *Convoy Company* v. *Taylor*, 334 P.2d 772, and identical in principle to *Stone* v. *Dunn Brothers*, 224 Miss. 762, 80 So.2d 802, originally *McKeigney* v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802 (1955), suggestion of error overruled 81 So.2d 712 (1955), 350 U.S. 878 (1955).

The facts clearly establish that the appellant is engaged in intrastate business activities, but, even if they are engaged in a continuation of interstate commerce, the tax does not violate the Commerce Clause because it is a tax on a local, exclusively Mississippi business activity performed by the appellant. This aspect will be discussed later in this Brief.

The Mississippi sales tax was imposed upon the activities of the appellant for the privilege of selling and performing transportation services exclusively within this state on waybills which are identifiable and easily separable from any waybills for transportation from Jackson, Mississippi, to another state and on which no sales tax was assessed or collected. The shipment by rail from the General Motors assembly plant in Georgia to General Motors in Jackson, Mississippi, is interstate commerce and no sales tax has been assessed or collected on the services for this movement. The automobiles are then massed at the destination point of the shipment and this concludes the interstate movement. There was no through bill of lading connected with any of the activities in question.

Interstate commerce must have a clear point of beginning and a point of termination and when the property reaches the consignee, General Motors in Jackson, Mississippi, this concludes the interstate movement. The factual situation as to shipments by General Motors in Jack-

son, Mississippi, to points either inside the State of Mississippi or outside the State of Mississippi must determine whether interstate or intrastate activities are then involved.

The question presented here is no different from a situation where a merchant located in Mississippi takes orders from customers, orders the merchandise from the factory, has the merchandise sent to his place of business, then ships the merchandise by common carrier to the customer. This is a common practice and certainly no contention is made by the carrier that he should not be assessed with the sales tax on the transportation charges because the merchandise was manufactured and shipped to the merchant from another state. A great majority of all merchandise falls in this category and to accept the appellant's theory would place an insurmountable, impossible task upon the states in their attempt to reconcile the business of the carrier, to determine which of their shipments is interstate and which is intrastate.

The services of Complete Auto on which the Mississippi sales tax was assessed were business activities conducted totally and exclusively within the State of Mississippi and performed in direct competition with Mississippi transporters who were subject to and paid the sales tax on identical services. The fact that Complete Auto did not apply for and obtain an intrastate permit should not relieve them of the liability of the sales tax levy for conducting an intrastate service performed exclusively within the State of Mississippi in direct competition with intrastate business and the appellant may not take advantage of intrastate competitors by attempting to hide behind the veil and pretext of an exemption that they cannot be assessed the tax because they are engaged exclusively in interstate commerce. They are in direct competition for the business to exploit the Mississippi trade

market, and the tax imposed no burden upon interstate commerce that was not assumed by all other transporters competing for the same business.

This case is identical to the case of *Convoy Co.* v. *Taylor*, 334 P.2d 772 (Washington, 1959). The only difference is that Ford Motor Company was the manufacturer and Convoy was the transporter, and Convoy had applied for and received an intrastate permit to transport within the State of Washington. The attempt by the appellant to distinguish the two cases had to do with the unloading of the vehicles at the rail site in Jackson, Mississippi. The actual mechanics of the unloading is unimportant because it is apparent that the vehicles were received at Jackson by General Motors or their agent because no one else could accept the property except the person to whom they are shipped or their agent. At any rate, they were received because they were subsequently shipped via Complete Auto by General Motors as shipper in Jackson, Mississippi, to a dealer located either within or without the state. Ford officials testified that they maintained possession and control of the automobiles until shipped out of Seattle by Convoy. This is precisely the same factual situation present in the case before this Court.

The case of *Stone* v. *Dunn Brothers, supra,* is also precisely on point, the only difference being that Tennessee Gas Transmission Company was shipping pipe instead of automobiles. The transactions were identical. Pipe was shipped on a bill of lading from the owner as consignor in California to themselves as consignee in Jackson, Mississippi. By separate waybill Dunn Brothers transported the pipe from Tennessee Gas Transmission Company in Jackson to sites along a right-of-way. The Mississippi Supreme Court held that this was intrastate commerce.

The Supreme Court of the State of Washington in affirming the sales tax levy indicated they considered this transaction as being one of intrastate commerce, but continued that it was not necessary to decide because the tax was properly levied without burdening interstate commerce, since it was a sales tax on a local business activity conducted within the State of Washington.

II. The Incidence of the Mississippi Sales Tax Is Not Upon the Privilege of Engaging Exclusively in Interstate Commerce but Rather Upon the Performing of Local Activities, Namely, the Sale and Performance of Transportation Services, Exclusively Within the State of Mississippi.

Even though the Mississippi sales tax is labeled a privilege tax, the sales tax is levied for selling and performing local transportation services and is required to be passed on to the consumer of the goods and services, the total activity or transaction occurring exclusively within the state. There could be no other reasonable interpretation. The Mississippi sales tax is not a condition precedent to doing business. The tax does not attach until the local activity is performed; the amount of tax is measured directly by the gross amount of the charge for the service which was performed. If there is no sale and performance of the distinctive local service, no tax is levied. Therefore, no sales tax is levied for the privilege or right to engage in any activity, only a tax for having conducted a sale of tangible personal property or a local service.

In this particular instance, the local service sold and performed was the charge for transportation services between a point of origin and a point of destination, both points located within the state. Any question concerning the two points within the state possibly being interpreted

as a point of entry and the point of departure for a through shipment may quickly be dispelled since the statute is directed to the sale and performance of transportation service conducted exclusively within this state, a distinctive and separate commercial transaction, for the performance of a specific business activity to be conducted entirely within the state.

To complete the proof that the sales tax was not levied solely for the privilege of conducting exclusively interstate commerce, there is the fact that no Mississippi sales tax was levied on any part of Complete Auto's receipts for services performed in interstate shipments (on transportation charges for transporting vehicles from Jackson, Mississippi, to dealers located in another state). Had the Mississippi sales tax been levied for the privilege of engaging exclusively in interstate commerce, the Mississippi sales tax would have been levied upon Complete Auto's total gross receipts from all transportation services from Jackson, Mississippi, to points both within and without the state. The tax was applied only to their intrastate sales and services. There is no question of apportionment of a tax or receipts.

The Mississippi sales tax could not be levied on through interstate shipments because there would be no local taxable activity, specifically, no sale of a transportation service being made and performed exclusively within this state. Therefore, the conclusion drawn by appellant, who apparently relied upon the *Spector Motor Company* case, *infra*, that the tax is upon the privilege of engaging in exclusively interstate commerce is obviously erroneous.

It is a well established principle of this Court that when a business is performing both interstate and intrastate business, a privilege tax may be imposed on the intrastate business. *Spector Motor Service, Inc.* v. *O'Con-*

nor, 340 U.S. 602 (1951); *Memphis Natural Gas* v. *Stone*, 335 U.S. 80 (1948); *International Harvester Co.* v. *Evalt*, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390 (1947).

The activity engaged in by the appellant, for which it received compensation upon which the tax in question was computed and paid, consisted wholly and only of transporting trucks on a waybill from a consignor at a point of origin to a consignee at a point of destination, this intrastate commercial event being the exact business on which the tax was levied and paid. *Interstate Oil Pipeline Co.* v. *Stone*, 337 U.S. 662-682 (1948).

III. Mississippi Sales Tax Levied on the Gross Receipts of Transportation Charges Received for Transporting Vehicles From a Consignor-Owner to Consignee, Both Within the State of Mississippi, Is Not an Invalid Imposition Upon Interstate Commerce Even If It Was a Continuation of an Interstate Movement.

The conclusion drawn by appellant that the Mississippi Supreme Court found that the activities engaged in by Complete Auto were exclusively interstate commerce is clearly erroneous. It is abundantly clear that the Mississippi Court found it unnecessary to determine the question of interstate or intrastate commerce since they specifically found that the incidence of the tax was the performance by appellant of the local business activity, performed exclusively within the State of Mississippi. This is established precisely by the Court's statement of the question before the Court: Whether the gross income derived by taxpayer from transporting automobiles from Jackson, Mississippi, to other points in the State of Mississippi is taxable by the state. *Convoy Company* v.

Taylor, supra; *Interstate Oil Pipeline Co.* v. *Stone, supra*; *Stone* v. *Dunn Brothers, supra.*

The State of Mississippi has recognized that shipments on a bill of lading from a consignor in one state to a consignee in another state is interstate commerce and no Mississippi sales tax has been levied on transportation charges provided for such services.

We also recognize that it is sometimes difficult to determine the precise line of the transition from interstate to intrastate commerce but in this case you have a much clearer and more definitive situation as established by the documents in evidence conclusively establishing the termination of interstate commerce in Jackson, Mississippi.

The local activities involved prior to shipping and local activities after arrival at a destination should therefore be considered and regarded in the same light as other local activities, and treated exactly alike with regard to the taxation of identical local services.

This is the sound, basic, and logical reasoning that has been applied by this Court for many years. It is a well-settled rule as indicated by this Court's decisions that when the incidence of the tax is placed upon a local activity and not upon the privilege to engage exclusively in interstate commerce, that the imposition of a sales tax based on the gross receipts received from the performance of the local service does not impose a burden on interstate commerce if the tax is fair, equitable, nondiscriminatory, and cannot be repeated by any other state.

The prevention of discrimination against interstate commerce does not impute nor imply that favoritism should be granted to it in the performance of local business activities or services applicable to competitors. *McGoldrick* v. *Berwin-White Coal Mining Co.*, 309 U.S. 33 (1940).

It is also a well-recognized principle of this Court by numerous decisions holding that interstate commerce should pay its own way. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250 (1938); *Northwestern States Portland Cement Co.* v. *Minn.,* 358 U.S. 450 (1959).

This case has been based upon decisions of other state courts and upon the principles laid down by the United States Supreme Court in cases as closely related in point of facts and law as could possibly be found.

IV. The Mississippi Sales Tax Applied to Appellant's Business Activities Was Not Discriminatory, the Tax Cannot Be Duplicated by Another State, and the Burden of the Tax Was on the Mississippi Consumer of the Services.

A. The appellant maintains and operates a large business activity in Jackson, Mississippi. They are in direct competition with intrastate transporters for transportation services. They are afforded all of the rights, privileges, and protection of Mississippi law provided other competitive businesses. They use all of the streets and highways of the state used by other intrastate transporters and are afforded full police protection of the state. They were placed under no restrictions which were not applicable to all alike. The State of Mississippi exacted a sales tax only from business transactions and activities conducted entirely within this state and the tax was assessed uniformly and without exception.

B. No other state can duplicate the tax and there can be no fear of multiplicity of taxation because the total taxable event was conducted entirely within this state.

When a sale can be localized completely in one state, there is no danger of multiple taxation, and, as in the case of a retail sales tax, the state may use as its tax base the total gross receipts arising within its borders. *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33, 84 L.Ed. 565, 60 S.Ct. 388, 128 A.L.R. 876 (1940).

Any fear of duplication may be entirely dispelled in this case because the total business transaction occurred within this state. It is a tax on a specific intrastate transaction and there is no question of apportionment involved.

We must begin with the proposition that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250, 254, 82 L.Ed. 823, 827, 58 S.Ct. 546, 115 A.L.R. 944 (1938).

Should the Court decide that the tax herein was improper, intrastate commerce would be the victim of discrimination[8] and such a decision would place upon intrastate commerce an intolerable competitive burden.

C. The appellant has not shown that the tax was discriminatory or that intrastate transporters were favored or received any advantages not afforded Complete Auto.

D. By statute, Section 10146-06, Mississippi Code of 1942, now Section 27-76-11, Mississippi Code of 1972, the vendor of the services is directed to collect the sales tax and pass it to the customer by adding to the gross receipts or income for the performance of the service the five

---

8. In the General Laws of Mississippi of 1972, Chapter 506, Section 10109(2), Mississippi Code of 1942, was amended by the Mississippi State Legislature to repeal the 5% sales tax on the intrastate transportation of personal property.

percent Mississippi sales tax. Therefore, Complete Auto does not bear the burden of the tax. It is charged to and collected from the recipient of the service and the total charge for service and tax is collected from the customer. It is readily ascertainable that the total charges are then billed to and paid for by the resident Mississippi automobile dealer who is the local recipient of the services.

Even though it is unimportant and has no legal bearing on the matter, it is interesting to note that the tax in question would amount to only five percent of the transportation charges. This charge, as indicated on the waybills of Complete Auto from Jackson, Mississippi, to a dealer also located in Mississippi, is approximately $30, and therefore the Mississippi sales tax on the average automobile transported would be approximately $1.50.

V. Cases Cited by Appellant As Support for Their Argument Are Inappropriate and Are Inapplicable to the Facts of the Present Case, but, in Fact, Directly Support the Contention of Appellee That the Intrastate Business Activities May Be Subject to the Mississippi Sales Tax.

The appellant has based its entire case solely on *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 609 (1951). Even though that case has been highly criticized and there was very strong and forceful dissent by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Clark, we actually find no fault with Spector as far as the present case is concerned. Actually, the Mississippi sales tax has been applied in strict accordance therewith, and *Spector* manifestly supports the contention of appellee that the levy of a sales tax on the local commercial activities is not a burden on interstate commerce.

A quick analysis of *Spector* substantiates the fact. In that case the tax was upon a franchise for the privilege of doing business. Spector's principal place of business was in Illinois. It was authorized by the Interstate Commerce Commission to do certain interstate trucking and by the Connecticut Public Utilities Commission to do part of such interstate trucking in Connecticut. It had not been authorized by the State of Connecticut to do intrastate trucking and *did not engage in it.* Petitioner's business was the *interstate transportation of freight by motor truck between east and west* on through bills of lading. When a full truckload was to be shipped to or from a customer in Connecticut, petitioner's over-the-road trucks go directly to the customer's place of business. In the case of less than truckload shipments, pickup trucks operated by the petitioner, gathered the freight from customers for assembly into full truckloads at either of two terminals maintained within the state. The pickup trucks merely acted as a part of the interstate transportation of the freight.

The tax did not discriminate between interstate and intrastate commerce. Neither the amount of the tax nor its computation was in question.

There are very distinct and basic differences in *Complete Auto* and *Spector*.

1. *Spector* involved a franchise tax for the privilege of carrying on or doing business in the state.

2. Spector was only doing interstate business. The shipments they carried were from a consignor at a point in one state to a consignee in another state. They did no intrastate hauling and therefore were conducting no local business of an intrastate character.

Since the tax was on a franchise for the privilege of doing business in Connecticut, and Spector was only shipping goods from a consignor in one state to a consignee in another state, they were actually engaged only in interstate commerce. Unlike *Spector*, the case of *Complete Auto* presents the opposite situation:

1. The Mississippi sales tax was levied on a business transaction performed exclusively intrastate on a waybill from a consignor-owner in Jackson, Mississippi, to a consignee also located in Mississippi.

2. No Mississippi sales tax was applied to any of Complete Auto's interstate transactions such as those in which Spector was totally engaged. Specifically, those shipments, from a consignor in one state to a consignee in another state, which are interstate in character were not taxed. No Mississippi sales tax was levied on any of Complete Auto's interstate shipments from Jackson, Mississippi, to a destination in another state.

In *Spector*, there was full agreement between the parties that the Connecticut franchise tax was placed upon the corporation for the privilege of carrying on or doing interstate business in the state.

In the case of *Complete Auto*, the Mississippi sales tax is levied for performing exclusively intrastate commercial business which is the exact opposite. The Mississippi sales tax is a tax levied on the sale of goods and services performed exclusively within the state, and the law further provides that the tax be passed to the consumer.

The Mississippi sales tax is not a license, nor a franchise. It does not attach until the intrastate sale or service is made; therefore it is not a prerequisite for doing business. If there is no sale of goods or services performed totally within the state there is no tax due. The

incidence of the tax is upon the intrastate sale. The movement of interstate commerce from one state to another could not be taxed under the provisions of the Mississippi sales tax law, since the tax applied only to intrastate commercial transactions, such as those engaged in by Complete Auto in direct competition with other intrastate transporters.

The ruling of the United States Supreme Court in the *Spector* case therefore would be appropriate and applicable only if Mississippi sought to levy a sales tax on shipments by Complete Auto from Jackson, Mississippi, to a destination in another state. Since this is forbidden by the *Spector* case as a tax on interstate commerce, no levy was assessed or collected on these transactions.

The same basic infirmity is readily ascertainable in the second case the appellant relies upon. *Colonial Pipeline Co.* v. *Traigle, Collector of Revenue of Louisiana*, 421 U.S. 100 (1975). That case also was a franchise tax upon the privilege of carrying on within a state certain activities, related to a corporation's operation of an interstate business.

This case may be disposed of quickly, since it is inapplicable to the case before this Court for the same reasons stated in *Spector* above. The incidence of the tax in *Colonial* was the engagement in exclusively interstate transactions not on a local, commercial sale or activity, whereas Complete Auto on the other hand is engaged in local intrastate commercial sales or services. Unlike Complete Auto, Colonial was engaged only in the interstate shipment of oil and there were no intrastate sales involved. They had no administrative officers in Louisiana and therefore were in fact conducting no exclusively intrastate activities.

The third and last case, *Railway Express, Inc.* v. *Virginia*, 347 U.S. 359 (1954), relied upon by the appellant for support is afflicted with the same basic deficiency in attempting to relate the facts and law to the present case.

This case involved an annual privilege license to do business within the State of Virginia and a tax levy measured by gross receipts from that portion of interstate operations apportioned to Virginia. The state denied Railway Express the privilege of engaging in intrastate business and Railway Express formed a separate corporation to conduct their intrastate commercial business activities, and that part of the business (comparable to Complete Auto in this case) in the present case is not in question. The state, under a separate and detailed system of taxation for *express companies*, then placed a tax on the privilege of engaging in a business, measured by Virginia's *proportionate* share of the interstate business which they conducted.

Since Railway Express had previously removed from consideration in the litigation that part of its activities specifically conducted in intrastate business transactions, the only business they were performing when the case was brought before the court was exclusively interstate shipments, from a consignor in one state to a consignee in another state. The court therefore held this to be an invalid imposition on the Commerce Clause because the tax was levied on the privilege of engaging in interstate commerce.

The only reference necessary to distinguish *Railway Express* from *Complete Auto* is that the sales tax levied against Complete Auto is for the performance of the same activity that was conducted by the separate corporation

formed by Railway Express, to perform its intrastate commercial activities and was not at issue.

The case before the Court in *Railway Express* concerned only the interstate business comparable to Complete Auto's interstate shipments upon which no Mississippi sales tax has been applied.

In view of the fact that appellant has relied solely upon *Spector*, *Colonial*, and *Railway Express* for their total support and all of these cases being inappropriate and inapplicable to support their contention since they specifically involved taxation pertaining to direct interstate shipments (from a consignor in one state to a consignee in another state), there should be no question remaining. As a matter of fact, the cases are strong support for the position of the appellee that the local commercial business activities, absent in the above cases but totally taxable events herein may be taxed, and the issue should be put to rest.

VI. The Mississippi Supreme Court Correctly and Accurately Found That the Tax Was Properly Levied and Did Not Violate the Commerce Clause of the Constitution of the United States (Art. I, § 8, Cl. 3) and Based Their Decision Upon the Following Cases.

In *Convoy Company* v. *Taylor*, 334 P.2d 772 (1959), the tax involved arose from the following method of transportation of Ford automobiles: The Ford Motor Company maintained an assembly plant in Richmond, California, from which it supplied cars to its dealers in western states, including Washington. A Washington dealer submitted an order to Ford's district sales representative in Seattle, designating the model and specifications of the automobile

desired. These orders, assembled in the sales office, were forwarded to the Ford assembly plant in California. As soon as the body was placed on the chassis, the dealer's name was placed on the windshield of the ordered unit and was attached to the automobile throughout the process of its assembly. The completed unit was then shipped to the dealer by the following method of transportation: The ordered automobiles were loaded in a railroad car at Richmond, California. The Ford Motor Company, as consignor, prepared a non-negotiable, uniform, straight bill of lading with itself, "Ford Motor Co., c/o Convoy Co., Seattle, Wn.," as consignee. The bill of lading contained a detailed description of each vehicle, together with the name of the ordering dealer, and the city in which he was located. At the same time, Ford Motor Company prepared invoices for each dealer showing his location, the type and model of vehicle, and the total charges to be collected upon delivery of the vehicle.

The Ford Motor Company forwarded the bills of lading and dealer invoices to the plaintiff. Upon arrival of the rail car at plaintiff's spur track in Seattle, plaintiff unloaded the automobiles; prepared freight bills to cover the truck portion of the movement, at rates stated in the company's interstate tariff; loaded the units on its truck equipment; and delivered the designated motor vehicles to the respective Ford dealers, as shown on the original bill of lading. No joint through-rates were in effect for rail-truck shipments of motor vehicles between the geographic points involved. The Ford Motor Company paid both the rail and truck transportation charges. Convoy Company was assessed a tax by the State of Washington on revenue derived from the transportation of new automobiles for the Ford Motor Company from Seattle, Washington, to Ford dealers in other Washington cities.

The Supreme Court of Washington held that the assessment of the tax did not contravene the interstate commerce clause of the United States Constitution because that portion of the transportation of the automobiles from the railroad depot in Seattle, Washington, to other cities in Washington constituted intrastate commerce. The Court said:

"The trial court's ultimate conclusion—that the tax imposed by RCW 82.16.020 on plaintiff's gross operating revenue derived from its transportation of automobiles from its spur track siding in Seattle to Ford dealers within the state of Washington does not contravene the limitations of the commerce clause of the Federal constitution, art. 1 § 8, cl.3—is sustained by either of two reasons: plaintiff's operation is purely one of intrastate commerce; or, the tax is not an invalid imposition on interstate commerce in the circumstances of the instant case.

"Diligence of counsel has directed our attention to a multitude of decisions in which the questions presented are discussed. To analyze all of the authorities would not clarify the situation, for, after reviewing them, we are impressed with the fact that

> " 'The wording of a judicial declaration of the precise line that marks the change from intrastate movement to interstate movement has been difficult.' (Dis. op.) Interstate Oil Pipe Line Co. v. Stone, 1949, 337 U.S. 662, 672, 69 S.Ct. 1264, 1269, 93 L.Ed. 1613.

"That plaintiff's operation in the state of Washington, as we have described it, is intrastate commerce, is sustained by the recent decision of the supreme court of Mississippi in McKeigney v. Dunn Brothers, Inc. (originally Stone v. Dunn Brothers, Inc.), 1955, 224 Miss. 762, 80 So.2d 802, 807; 224 Miss. 777, 81 So.2d 712.

"Tennessee Gas Transmission Company, which was laying a pipeline in Mississippi, purchased pipe in California. The Transmission Company, as consignor, shipped the pipe by railroad to itself, as consignee, for delivery at various railheads or depots in Mississippi. Bills of lading were issued accordingly. The Transmission Company had contracted with Dunn Brothers, a motor carrier operating under a certificate from the interstate commerce commission, to deliver the pipe from the depots to various points within the state.

"When the shipment arrived at its destination, the Transmission Company, by an agent, inspected it for damage in transit. Dunn Brothers then took possession of the shipment from the railroad and delivered it as instructed. The court held that '[t]his was, in effect, a delivery to the Transmission Company. The interstate journey was then at an end.'

"Mississippi assessed a two per cent tax, similar to the tax in the instant case, against Dunn Brothers' gross income realized from the operation described. The tax was held to be valid. The court said:

> " 'It is only for the carriage within Mississippi that the tax is demanded. A local drayman or an intrastate carrier would have been obliged to pay the tax here demanded. If, under the circumstances of this case, appellee should prevail, then by reason of its claim of interstate commerce, it would escape the burdens which fall on its competitors in intrastate commerce. Evidently equality for, not favoritism to, interstate commerce was the underlying purpose of Article 1, Section VIII, cl. 3, of the U. S. Constitution.'

"The court concluded:

> " 'So, the service by Dunn Brothers in carrying the pipe, after its acceptance by the Transmission Company, from depot or railhead in Mississippi to the right of way also in Mississippi, was an activity wholly within the state of Mississippi, *was therefore intrastate*, and the gross income therefrom was subject to the tax of two per cent. However if it may be said that this was a fringe situation and therefore uncertain, nevertheless the appellee is still liable for this tax as a recompense for the protection which it was afforded by the state as it engaged in this activity. Thus, for both reasons, as above stated, the tax was properly assessed and collected.' (Emphasis theirs.)

"On appeal to the United States Supreme Court, the Dunn Brothers' case was dismissed for 'want of a substantial federal question.' 1955, 350 U.S. 878, 76 S.Ct. 139, 100 L.Ed. 775.

"We note that the Mississippi court alluded to a conclusion similar to our second reason for deeming the tax a valid one—that it is not an invalid imposition on interstate commerce.

"Support for this conclusion is found in the rationale expressed in Interstate Oil Pipe Line Co. v. Stone, 1949, 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613, and cases cited. The facts are adequately set forth in the syllabus of the opinion, as follows:

> " 'Appellant owns and operates pipe lines used to transport oil from lease tanks to railroad loading racks in Mississippi. Delivery of the oil to appellant by the owner is accompanied by instructions for shipping it interstate. The oil is pumped from the loading

racks into railroad tank cars; and, if no tank cars are available, it is stored, but never longer than a week. In the bills of lading, which covered only the rail shipment, the owner is designated as shipper and appellant as his agent, and the out-of-State destination is indicated. Mississippi levied against appellant a tax measured by appellant's receipts from the transportation of the oil from the lease tanks to the loading racks.'

"A majority of the court held that the tax was valid. Mr. Justice Rutledge, with whom three other members of the court agreed, said:

" 'We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce for, even if we assume that it is, Mississippi has power to impose the tax involved in this case. * * *

" 'The statute is not invalidated by the commerce clause of the Federal Constitution merely because, unlike the statute attacked in Memphis [Natural] Gas Co. v. Stone, supra [335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832], it imposes a "direct" tax on the "privilege" of engaging in interstate commerce. Any notions to the contrary should not have survived [State of] Maine v. Grand Trunk R. Co., 142 U.S. 217, 12 S.Ct. 121, 163, 35 L.Ed. 994, which flatly rules the case at bar. That case sustained a state statute which imposed upon an interstate railroad corporation "an annual excise tax [measured by apportioned gross receipts], for the privilege of exercising its franchises in this State." The Grand Trunk decision has been approved by this Court as recently as the other controlling case of Central Greyhound Lines [of New

York, Inc.] v. Mealey, supra, 334 U.S. [653] at pages 658, 663, 68 S.Ct. [1260], at pages 1263, 1266, 92 L.Ed. 1633, in which the Court permitted New York to impose a tax on the gross receipts from the operation of an interstate bus line, provided that tax was apportioned according to mileage traveled within the state.'

"The concluding paragraph of Mr. Justice Rutledge's opinion is of particular significance to the case before us.

" '*Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax.*' (Emphasis added)

"Mr. Justice Burton concurred in the result on the ground that the tax was levied against intrastate commerce.

"We conclude, therefore, that the judgment must be affirmed.

"It is so ordered."

In *Stone* v. *Dunn Brothers*, 224 Miss. 762, 80 So.2d 802 (1955), the Mississippi Supreme Court held that the service of a motor carrier in delivering pipe, shipped by rail from another state to Mississippi, after its acceptance by the buyer from the railroad in Mississippi, to the buyer's pipe line right of way also in Mississippi, was activity conducted wholly within the State of Mississippi, and therefore intrastate commerce, and gross income derived

therefrom was subject to state sales tax. The court used the following applicable language:

"In Interstate Oil Pipe Line Company v. Stone, 203 Miss. 715, 35 So.2d 73, 78, 36 So.2d 142, which had under consideration Sections 10105 and 10109, Code of 1942, Annotated, though a different paragraph of Section 10109, supra, it was held that the tax there involved was on income derived from the transportation of oil by the pipe line from wells to shipping points and for pumping the oil into tank cars for shipment by rail out of the state. The opinion quoted from 11 Am.Jur., Commerce, Section 28, p. 28, as follows: ' 'It is not within the power of the parties by the form of their contract to convert what is exclusively a local business, subject to state control, into an interstate business, protected by the commerce clause."' The quotation from the text was documented by Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622; Superior Oil Co. v. Mississippi, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504; Browning v. Waycross, 233 U.S. 16, 34 S.Ct. 578, 58 L.Ed. 828. The opinion also cited 15 C.J.S., Commerce, §§ 18-25, pp. 278-291, to the same effect. The Court observed that 'the oil was not committed by the owner to this pipe line company for transportation to another state, but to be transported to the railroad and there loaded into tank cars.' The opinion then cited Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, to show that the carrying of articles in carts or other vehicles to the depot, where the journey is to commence, is no part of the journey; and likewise the carrying of articles from the farm or forest to the depot is only an interior movement.

"On the Pipe Line's appeal the Supreme Court of the United States affirmed. Interstate Oil Pipe Line v. Stone, 337 U.S. 662, 69 S.Ct. 1264, 1266, 93 L.Ed. 1613.

"Four of the justices in an opinion written by Justice Rutledge said: 'We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce for, even if we assume that it is, Mississippi has power to impose the tax involved in this case. Further, we do not find it necessary to dispute that the Supreme Court of Mississippi construed the statute as imposing a tax on the privilege of operating a pipe line wholly within the state, and not a tax solely upon the "local activities of 'maintaining, keeping in repair, and otherwise in manning the facilities' " situated in Mississippi, Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 92-93, 68 S.Ct. 1475, 1481, 92 L.Ed. 1832 [1842, 1843], or upon the gross receipts themselves, Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633. While we are of course bound by the construction given a state statute by the highest court of the State, we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels.' The opinion also said: 'Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax.' Justice Burton concurred in the result on the ground that the imposition 'was a tax on the privilege of operating a pipe line for transporting oil in Mississippi in intrastate commerce and that, as such, it was a valid tax.' Justice Reed in the dissenting opinion, among other things, observed that 'An interstate journey must have a beginning and an end. Common

sense rejects an extension of the journey to the traveler's front door or the producer's farm or factory when no through order for carriage is in effect. The exact limits of interstate commerce in such fringe situations are uncertain. * * * this Court has interpreted the commerce clause to permit state nondiscriminatory taxation for the use of state facilities, upon the property used in interstate commerce, upon production for commerce, and upon net proceeds therefrom. Through such taxes, the states may exact payment for their protection and encouragement of commerce. Joseph v. Carter & W. Stevedoring Co., 330 U.S. 422, 429, 67 S.Ct. 815, 819, 91 L.Ed. 993 [1001], and cases cited.'

"*The only factual difference between the case of Interstate Oil Pipe Line* v. *Stone, supra, and the case now before the Court is that, in that case, the tax on income was derived from the transportation of oil from wells to the shipping points and pumping the same into the tank cars for shipment by rail out of the state—at the beginning of the journey—whereas the tax here was imposed on income which was derived from hauling pipe from the railhead to the right of way—at the end of the journey.* (Emphasis added)

"In Stone v. Memphis Natural Gas Co., 201 Miss. 670, 29 So.2d 268, 270, the appellee was held to be liable for the state franchise tax, although its business was solely and exclusively interstate, and it was not engaged in any intrastate business. The Court said that the franchise tax was not one upon 'doing business' as that term is ordinarily understood. The opinion pointed out that there was 'no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities

which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.'

"On the Gas Company's appeal, the decision of this Court was affirmed by the Supreme Court of the United States. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832. Three of the Justices held that the tax, under the construction of this Court, was additional recompense for protection of the pipe line's local activities, and could not therefore be regarded as one on the privilege of doing interstate business; that the activities taxed were not under the protection of the commerce clause; and that the burden of such tax was no more unreasonable than the permissible ad valorem tax. A fourth Justice held that the tax was within the territorial limits of the state's taxing power; that it placed no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; that it did not undertake to tax interstate activities carried on outside of the state's border; and that it could not be repeated by another state. The fifth Justice concurred in the result.

"The language of Justice Reed, in his dissenting opinion in Interstate Oil Pipe Line Company v. Stone, supra, namely, that 'an interstate journey must have a beginning and an end', must be kept in mind; likewise the opinion of the Supreme Court in Coe v. Errol, supra, that the carrying of articles in cars or other vehicles to the depot, where the journey is to commence, is no part of the journey; and that the carrying of articles from the farm or forest to the depot is only an interior movement. Again, the language of Justice Reed, in his dissent-

ing opinion, supra, should be recalled, namely, that 'common sense rejects an extension of the journey to the traveler's front door or the producer's farm or factory when no through order for carriage is in effect.' He again well said that 'the exact limits of interstate commerce in such fringe situations are uncertain.'

"If the above reasoning is followed, the journey in interstate commerce in this case began at the railroad's depot in the State of California. The transportation of the pipe from the foundry to the depot was only an interior movement. The Transportation Company was the shipper. It consigned the shipment from a point in California to itself at a point in Mississippi. The railroad company, the interstate carrier, issued its bill of lading to the Transmission Company, as both consignor and consignee, showing its agreement to deliver the shipment from a depot in California to a railroad depot, or railhead in the State of Mississippi. When the shipment arrived at its destination, the Transmission Company, by an agent, inspected and accepted it. Following this acceptance, Dunn Brothers took over the shipment from the railroad. This was, in effect, a delivery to the Transmission Company. The interstate journey was then at an end. The railroad company, the interstate carrier, had agreed to deliver the shipment from a point in California to a point in Mississippi, and this agreement of carriage had been fully performed. The Transmission Company then engaged another carrier, a motor carrier, Dunn Brothers, to deliver the shipment from the depot, or railhead, along its right of way; and the fact that this procedure had been agreed upon, prior to the railroad's delivery, did not change the essential features of the activity. *Nor did the fact that Dunn Brothers held a certificate as a carrier for interstate commerce grant it immunity, when it was carrying intrastate*

commerce exclusively. It is only for the carriage within Mississippi that the tax is demanded. A local drayman or an intrastate carrier would have been obliged to pay the tax here demanded. If, under the circumstances of this case, appellee should prevail, then by reason of its claim of interstate commerce, it would escape the burdens which fall on its competitors in intrastate commerce. Evidently equality for, not favoritism to, interstate commerce was the underlying purpose of Article I, Section VIII, cl. 3, of the U. S. Constitution.

"The case of Gross Income Tax Division v. J. L. Cox & Son, 227 Ind. 468, 86 N.E.2d 693, 10 A.L.R.2d 642, from the Supreme Court of Indiana, is directly in point.

"The case of American Express Co. v. Miller, 104 Miss. 247, 61 So. 306, 45 L.R.A., N.S., 120, is not in point. In that case, the packages were delivered by the liquor dealers in Louisiana to the boats, and the masters issued bills of lading for the entire journey, across the state line, to the customers in Mississippi, collecting at the time the charge for the completed transportation, with no opportunity or right of the original shipper thereafter to accept or control the shipment. The transportation was continuous from the shipper to the consignee. (Emphasis added)

. . . "Interstate transportation should bear a fair share of the cost of the local government whose protection it enjoys. Many decisions of the Supreme Court of the United States show that, so far as the commerce clause is concerned, state taxes may be validly laid on corporations which carry on local activities sufficiently separate from interstate commerce, even though such taxes amount to the same as if levied on the interstate business itself. Independent Warehouses v. Scheele, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346; McGoldrick v. Berwind-White Coal Min. Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128

A.L.R. 876; Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 S.Ct. 273, 84 L.Ed. 304; Southern P. Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 58 S.Ct. 736, 82 L.Ed. 1043; Utah Power & L. Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; Western Cartridge Co. v. Emmerson, 281 U.S. 511, 50 S.Ct. 383, 74 L.Ed. 1004, Hump Hairpin Mfg. Co. v. Emmerson, 258 U.S. 290, 42 S.Ct. 305, 66 L.Ed. 622; and American Mfg. Co. v. St. Louis, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084. See also Stone v. Stapling Machines Co., Miss., 71 So.2d 205, which the Supreme Court of the United States refused to review. See also Mavar Shrimp & Oyster Co., Ltd. v. Stone, Miss., 73 So.2d 109.

"So, the service by Dunn Brothers in carrying the pipe, after its acceptance by the Transmission Company, from the depot or railhead in Mississippi to the right of way also in Mississippi, was an activity wholly within the State of Mississippi, was therefore intrastate, and the gross income therefrom was subject to the tax of two per cent. However, if it may be said that this was a fringe situation and therefore uncertain, nevertheless the appellee is still liable for this tax as a recompense for the protection which it was afforded by the state as it engaged in this activity. Thus, for both reasons, as above stated, the tax was properly assessed and collected. Hence the judgment of the trial court is reversed, and a judgment will be entered here for the appellant.

"Reversed and judgment here for appellant."

In *Interstate Oil Pipe Line Company* v. *Stone*, *supra*, the Court said:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and

interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. Interstate Oil Pipe Line Co. v. Stone, supra; International Harvester Co. v. Evatt, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390; Atlantic Lumber Co. v. Com'r of Corporations and Taxation, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328. *The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, Central Greyhound Lines* v. *Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633,* or the publication of a newspaper, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. See also, Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832." (Emphasis added.)

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

JAMES H. HADDOCK
JOE D[illegible]LLASPY
WILLIAM N. LOVELADY, JR.
Post Office Box 1033
Jackson, Mississippi 39205
Counsel for Appellee

FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPELLANT'S REPLY BRIEF

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK, JR.
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Introduction 1

Argument—

I. Complete Auto's Activities in Completing the Interstate Movement of the Motor Vehicles From the Manufacturing Plant to the Designated Dealers Constituted Interstate Transportation 3

II. A State Cannot Constitutionally Levy a Privilege Tax on Interstate Commerce 9

III. This Tax Is a Privilege Tax on Exclusively Interstate Commerce 9

A. The Tax Is a Privilege Tax 10

B. This Privilege Tax Is Imposed on Interstate Commerce and Not on Any Local Activity 14

IV. This Case Is Controlled by the Principles Enunciated in *Spector* and *Railway Express I* 16

V. Complete Auto Would Be Severely Prejudiced by Retroactive Imposition of This Tax 18

Conclusion 19

Appendix A—Section 27-65-27, Mississippi Code of 1972, Annotated 21

Appendix B—Section 27-65-85, Mississippi Code of 1972, Annotated 23

Table of Authorities

CASES

Colonial Pipeline Co. v. *Traigle*, 421 U.S. 100 (1975) 7, 19

Convoy Company v. *Taylor*, 334 P.2d 772 (Wash. 1959) 6, 7

The Daniel Ball v. *United States*, 77 U.S. (10 Wall.) 557 (1871) 5

Interstate Oil Pipe Line Co. v. *Stone*, 337 U.S. 662 (1949) 11, 15
Minnesota v. *Blasius*, 290 U.S. 1 (1933) 5
Monaghan v. *Southern Bell Telephone & Telegraph Co.*, 242 Miss. 611, 136 So.2d 198 (1962) 12
Railroad Commission v. *Texas & P. Ry. Co.*, 229 U.S. 336 (1913) 4
Railway Express, Inc. v. *Virginia*, 347 U.S. 359 (1954) 2, 16, 17, 18, 19
Spector Motor Service, Inc. v. *O'Connor*, 349 U.S. 602 (1951) 2, 7, 9, 14, 16, 17, 18, 19
Stone v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802, suggestion of error overruled, 81 So.2d 712, appeal dismissed, 350 U.S. 878 (1955) 6, 7
United States v. *Yellow Cab Company*, 332 U.S. 218 (1946) 5
Western Oil Refining Company v. *Lipscomb*, 244 U.S. 346 (1917) 4

STATUTES

Mississippi Code of 1942—
Section 10105 ..... 10, 11, 12
Section 10109 12
Section 10115 12
Section 10133 14
Mississippi Code of 1972, Annotated—
Section 27-65-13 ..... 10, 12, 14, 15
Section 27-65-19 12
Section 27-65-27 ..... 12, 14
Section 27-65-85 14
Mississippi Laws of 1972, Chapter 506 17

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,
vs.
CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPELLANT'S REPLY BRIEF

INTRODUCTION

As indicated in our original Brief, a proper resolution of the question presented by this case might require the consideration of five separate issues.

(1) Did the activities of Complete Auto in continuing the transportation of the motor vehicles from an out-of-state manufacturing point to dealer locations in Mississippi constitute interstate commerce?

(2) Do established constitutional principles prohibit the levy of a state privilege tax on the privilege of engaging in an exclusively interstate business?

(3) If established constitutional principles prohibit the imposition of a privilege tax on the privilege of en-

gaging in exclusively interstate commerce, should those existing principles be modified?

(4) If these existing limitations on state taxing power are to be modified, is Congress or this Court the most appropriate body to make such a modification?

(5) If the existing constitutional standards were to be changed by this Court, should any modification of the principles on which numerous taxpayers have relied be made effective prospectively or retroactively?

The Tax Commission's Brief argues at some length that the activities of Complete Auto constitute intrastate commerce. And although the Tax Commission's Brief purports to distinguish this tax from the levies proscribed by *Spector*,[1] it acknowledges the existing principle that states may not levy privilege taxes on exclusively interstate commerce.

The Tax Commission has made only indirect references to the arguments in our Brief pertaining to the policy considerations implicit in *Spector, Railway Express I*,[2] and other cases which enunciate the same rule. The Tax Commission has not discussed our position that any change in the long-existing and Congressionally-recognized standards governing privilege taxes should be made by Congress and not by this Court. Nor has the Commission replied to the point that Complete Auto relied on the principles set out in *Spector*, and that any change in the rule therein enunciated, if it is to be made at all, should be applied only prospectively.

We now respond to the arguments advanced in the Tax Commissioner's Brief.

---

1. *Spector Motor Service, Inc.* v. *O'Connor*, 349 U.S. 602 (1951).

2. *Railway Express, Inc.* v. *Virginia*, 347 U.S. 359 (1954).

ARGUMENT

I. Complete Auto's Activities in Completing the Interstate Movement of the Motor Vehicles From the Manufacturing Plant to the Designated Dealers Constituted Interstate Transportation

The Tax Commission's Brief clearly reveals the Commission's basic and persistent contention. This case began, and has continued, because of the Tax Commission's obdurate adherence to one position—that the use of separate shipping documents for the rail and truck portions of the interstate journey conclusively establishes that Complete Auto's activities were intrastate commerce.[3] Indeed, the Commission's Brief[4] states:

> The only facts for consideration would be the way bills or shipping document on which the appellant transported property within Mississippi which clearly established the shipper as General Motors, Jackson, Mississippi, to a dealer also located in Mississippi, and no further need for even a consideration of any interstate question. The only pertinent fact for consideration is that General Motors, either directly or by agent, ships merchandise from themselves in Jackson, Mississippi, to a dealer located in Mississippi.

From this language, and from similar language repeated throughout the Tax Commission's Brief,[5] it is perfectly clear that the Commission has completely ignored

---

3. Separate documents were prepared for the rail and truck portions of the journey because the carriers had not filed joint rates with the Interstate Commerce Commission (App. 68-69, 72-73).

4. Appellee's Brief, at 13 n. 5.

5. Appellee's Brief, at 14, 15, 17, 20, 21, and 26.

the undisputed fact that the transportation at issue in this case was an integral part of a continuous passage from a point in one state to points in other states.

The following facts are uncontroverted: (a) the intention of General Motors was to ship the vehicles from the place of manufacture in one state to various designated dealers located in other states; (b) General Motors had nothing whatsoever to do with the vehicles after they were delivered to the rail carrier; (c) the only break in the shipment of the motor vehicles was for the purpose of loading the motor vehicles from the railroad cars to the trucks; and (d) the transportation of the motor vehicles continued to the designated dealers after the change from one carrier to the other.

This Court has long held that ". . . it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. . . ." *Western Oil Refining Company* v. *Lipscomb*, 244 U.S. 346, 349 (1917). In *Railroad Commission* v. *Texas & P. Ry. Co.*, 229 U.S. 336, 341 (1913), the Court stated:

> In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases were [sic] that *it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country.* The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans (Emphasis added).

Similar language is found in numerous other decisions of this Court. See, *e.g.*, *Minnesota* v. *Blasius*, 290 U.S. 1, 9-10 (1933).

Moreover, it has long been established that when separate and independent carriers, some acting in one state and some acting in two or more states, are engaged in the transportation of a commodity from one state to another, each carrier is engaged in interstate commerce. See, *e.g.*, *The Daniel Ball* v. *United States*, 77 U.S. (10 Wall.) 557 (1871). *United States* v. *Yellow Cab Company*, 332 U.S. 218, 228-29 (1946).

The principles enunciated in these cases were presented in our original Brief. The Tax Commission's only response to our argument has been its insistence that the separate form of the shipping documents is controlling. We can find no support, however, in law or logic to support the controlling significance which the Tax Commission seems to claim for this fact.

The important fact is that, from beginning to end, the shipments involved in the present case were *through shipments*. The form of the bills of lading was simply the method adopted by General Motors to carry out its intent—of effectuating the interchange of the shipment from a rail carrier to a truck carrier in Jackson, Mississippi. Because no joint rates were filed with the Interstate Commerce Commission, General Motors was required to use separate shipping documents (App. 68-69). There was nothing unusual or significant about the form of the documents used by General Motors. In order for General

Motors to accomplish its original and only objective—transportation of the motor vehicles directly to designated dealers—it was necessary to direct the rail carrier to deliver the motor vehicles to the truck carrier which was to continue the transportation. The motor vehicles were in the custody, care, and control of one or the other of the carriers from the time of delivery to the rail carrier until delivery by the truck carrier to the respective dealer. Neither carrier performed any duties other than those ordinarily performed by interchanging carriers.

We note that the Commission's Brief devotes some fifteen pages to quotations from two state court decisions, *Convoy Company* v. *Taylor*, 334 P.2d 772 (Wash. 1959) and *Stone* v. *Dunn Brothers, Inc.*, 224 Miss. 762, 80 So.2d 802, suggestion of error overruled, 81 So.2d 712, appeal dismissed, 350 U.S. 878 (1955). Their importance to the resolution of this case, however, is much less than the Commission's Brief would indicate.

Dunn Brothers is clearly inapposite to the case at bar. *Dunn Brothers* involved the transportation of pipe from outside Mississippi to a railhead within Mississippi. At the railhead the pipe was inspected and accepted by the transmission company (which was both the shipper and the ultimate consignee). From the railhead, the pipe was delivered to various points along the right-of-way of the pipeline being constructed, in accordance with instructions given to the motor carrier by the transmission company. Of course, no particular piece of pipe had any specific destination. The Mississippi Supreme Court held that the interstate journey of the pipe terminated with delivery to the transmission company at the railhead in Mississippi. In *Dunn Brothers*, the pipe was actually inspected and accepted by the owner at the railhead before it was transferred from one carrier to another. Further,

in *Dunn Brothers* the pipe had no ultimate destination other than to be strung along the right-of-way of the pipeline in accordance with the instructions and directions of the owner. In other words, the transmission company took possession of the pipe, inspected and accepted it, and then gave directions to the truck carrier as to where and how to string the pipe along the right-of-way.

Thus, we submit that it is clear that *Dunn Brothers* provides no support for the Commission's contention that Complete Auto's activities were intrastate in nature, since General Motors did not inspect or accept the motor vehicles in Jackson, and did not redirect the motor vehicles to their final destination.

The Commission has relied on one other state court decision, *Convoy Company* v. *Taylor*, 334 P.2d 772 (Wash. 1959). That decision was not appealed to this Court. Clearly, one of the alternative bases for the holding in *Convoy Company*—that a nondiscriminatory privilege tax on exclusively interstate commerce is permissible—directly contradicts the holdings of this Court in *Spector, Railway Express, Inc.* and *Colonial Pipeline*.[6] The basis for the Washington court's alternative holding—that the motor carrier's activities were intrastate in nature—is completely unreasoned and unsupported by any authority. We submit that the decision of the Washington court, to the extent that it may provide any support for the Commission's position,[7] is erroneous.

Thus, it is and has been our position that the continuous, pre-arranged transportation of the motor vehicles from

---

6. *Colonial Pipeline Co.* v. *Traigle*. 421 U.S. 100 (1975).

7. *Convoy Company* may well be distinguishable from this case, since the carrier apparently conducted some taxable intrastate business. In addition, the court's opinion apparently implies that the shipper exercised rights to redirect the motor vehicles upon their arrival at the railhead. 334 P.2d at 773.

the point of manufacture in one state to various, predesignated dealer locations in Mississippi constituted interstate commerce. This position was adopted by the trial court, which stated:

> The Court is impressed with the fact that once the vehicle was delivered to the rail carrier, General Motors had absolutely nothing further to do with the vehicle (App. 100).

We believe that the Mississippi Supreme Court also found, at least by implication, that Complete Auto's activities constituted interstate commerce. In any event, however, even the Tax Commission admits that the Supreme Court did not hold that the activities were intrastate.[8]

This dispute arose out of the Tax Commission's contention that the form of the shipping documents transformed this interstate transportation into intrastate commerce. Neither of the Mississippi courts adopted the Commission's position; both the trial court and the Mississippi Supreme Court found that the activities of Complete Auto could be taxed notwithstanding their interstate character. Thus, in its insistence that the activities of Complete Auto were intrastate commerce, the Tax Commission is in the position of urging either that this Court should reverse the State courts on this issue, or that this Court should base its decision on a theory other than the one relied upon by the Mississippi courts.

In sum, we submit that Complete Auto was clearly engaged in continuing the interstate movement of the motor vehicles. We further submit that the Tax Commission's one argument—that the separate shipping documents conclusively established the intrastate nature of the transportation—ignores the law and the undisputed facts in this case. Accordingly, this Court should reject, as the Mississippi courts rejected, the Tax Commission's argument that Complete Auto's activities were intrastate in character.

8. The Commission's Brief asserts that the Mississippi Supreme Court found it unnecessary to characterize the transportation as interstate or intrastate (Appellee's Brief, at 20).

II. A State Cannot Constitutionally Levy a Privilege Tax on Interstate Commerce

The Tax Commission's brief has admitted that *Spector* would have forbidden the imposition of this privilege tax on the transportation of motor vehicles from Jackson, Mississippi to destinations in states other than Mississippi.[9] The Tax Commission's Brief assigns *Spector* as the reason why the tax was not assessed or collected on those transportation activities. Accordingly, the Tax Commission has conceded the accuracy of the legal position stated in our original Brief—that a state cannot constitutionally levy a privilege tax on exclusively interstate commerce.

III. This Tax Is a Privilege Tax on Exclusively Interstate Commerce

Apparently recognizing the inconsistency of the opinion of the Mississippi Supreme Court with the decisions of this Court, the Tax Commission's Brief[10] has proposed an alternative argument in an effort to justify the Mississippi courts' result. Frankly, we are somewhat confused as to whether the Tax Commission is urging (a) that the tax is not a privilege tax, or (b) that the tax, although a privilege tax, is levied on something other than interstate commerce. Since the Commission's Brief appears to espouse both arguments, although they are not separately delineated, we shall respond to each in turn.

9. Appellee's Brief, at 21 and 27.

10. Appellee's Brief, at 18-20.

A. The Tax Is a Privilege Tax

The Tax Commission's attempt to reinterpret this statute as anything other than a privilege tax borders on the frivolous. Quite frankly, we are uncertain how the Tax Commission's proposed interpretation of the statute (which it asserts is the only reasonable interpretation) makes the tax anything other than a privilege tax. The Commission's attempt to reinterpret the statute at this stage of the proceedings is somewhat surprising, since the Tax Commission did not present the proposed construction (or reconstruction) of the statute to either of the courts below. Indeed, the Commission did not attempt to contradict the statement in our lower court Brief that the tax "is a tax on the *privilege* of conducting the business."[11] We submit that since this new interpretation of the statute was not presented to the state court, it is far too late in the day for the Tax Commission to advance a new construction of the state statute.

However, whether or not this new "interpretation" of the statute is timely presented, it certainly has no merit. At the outset, the statute itself makes clear that it levies "*privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this state. . . ." (Emphasis added).[12]

---

11. Brief of Appellant in the Mississippi Supreme Court, at 10.

12. The full text of Section 27-65-13, Mississippi Code of 1972, Vol. 9, page 12 [recodifying Section 10105, Mississippi Code of 1942 (1972 Supp.)] is as follows:

> There is hereby levied and assessed, and shall be collected, *privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections. (Emphasis added.)

Moreover, it is clear from prior decisions of this Court and the Mississippi Supreme Court that this Mississippi tax is a privilege tax. The plurality opinion in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U.S. 662, 666 (1949), recognizes that the statute imposes "a 'direct' tax on the 'privilege' of engaging in interstate commerce." The dissenting opinion, 337 U.S. at 670-71, contains the following language:

> From the facts, §§ 10105 and 10109 of the statute, and the opinion of the Supreme Court of Mississippi, we believe that this statute was determined by the state to impose a privilege tax for carrying on the intrastate business of common carrier of oil in Mississippi and that the amount of that privilege tax was to be determined by a measure—two percent of the gross income—of that intrastate business. Mississippi's interpretation of the meaning of its statute is binding on this Court. A federal question at once emerges—whether the shipment of the oil from the gathering point to the railroad in Mississippi, is intra- or interstate transportation. (Footnote omitted).

Of course, the statute involved in *Interstate Oil*[13] was the direct predecessor of the statute involved in this case. If anything, the current version of the statute makes it even more explicit that this tax is imposed on the privilege of engaging in commerce. Indeed, the Mississippi Supreme

---

13. The statute at issue in *Interstate Oil*, Section 10105, Mississippi Code of 1942, Ann., Vol. 7A, page 324, read, prior to its amendment in 1955, as follows:

> There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows [see sections following]:

Court, in construing the current version of the statute,[14] has characterized the tax imposed thereby as "a privilege tax imposed upon the taxpayer for the privilege of doing business within the state." *Monaghan* v. *Southern Bell Telephone & Telegraph Co.*, 242 Miss. 611, 623, 136 So.2d 198, 202 (1962).

As best we can determine, the Tax Commission bases its contention that this is not a privilege tax on the theory that the tax is not "a condition precedent to doing business"[15] and the tax "is not a license to engage in business."[16] We think it abundantly clear that a statute which levies a privilege tax for the privilege of doing an exclusively interstate business is invalid, whether the statute requires compliance by the taxpayer precedent to or subsequent to engaging in business.

In any event, however, the Commission's legal premise—that the statute contains no licensing provision and no requirement for compliance before engaging in business—is flatly contradicted by the statute itself.

It is clear that compliance with the Mississippi sales tax statute is a condition precedent to engaging in business in Mississippi. Section 27-65-27,[17] Mississippi Code of 1972, Vol. 9, p. 33 [which recodified Section 10115, Miss. Code of 1942], provides, in pertinent part, as follows:

> *Any person who is engaged, or who intends to engage, in any business or activity which will subject*

14. Sections 10105 and 10109, Mississippi Code of 1942, Vol. 7A, Supp. 1972, page 280, now codified as Sections 27-65-13 and -19, Mississippi Code of 1972, Ann., Section 27-65-13 is set out at note 12 above; Section 27-65-19 is set out in Appendix A to our original Brief.

15. Appellee's Brief, at 8 and 18.

16. Appellee's Brief, at 8 and 26.

17. The full text of Section 27-65-27 is set out in Appendix A to this Brief.

> *such person to a privilege tax imposed by this chapter, shall apply to the commissioner for a permit to engage in and to conduct any business or activity* upon the condition that he shall pay the tax accruing to the state of Mississippi under the provisions of this chapter, and shall keep adequate records of such business or activity as required by this chapter. *Upon receipt of such permit, the applicant shall be duly licensed under this chapter to engage in and conduct such business or activity. . . .*
>
> * * *
>
> The commissioner is hereby authorized to revoke the permit of any person failing to comply with any of the provisions of this chapter. . . .
>
> *Any person liable for the tax who fails to obtain a permit* from the commissioner, *or who continues in business after such permit has been revoked, . . . or who fails to pay any taxes due hereunder, shall forfeit his rights to do business in this state* until he complies with all the provisions of this chapter and until he enters into [a required bond]. . . .
>
> *If any person is engaged in or continuing in this state in any business or activity without obtaining a permit, or after such permit has been revoked, . . . and without paying all taxes due by him hereunder, it shall be the duty of the commissioner to proceed by injunction to prevent the continuance of said business.* Any temporary injunction enjoining the continuance of said business shall be granted without notice by a judge or chancellor now authorized to grant injunctions (Emphasis added).

This section requires that a person who intends to engage in a taxable business within the state apply for

a "permit." Upon receipt of the permit, the taxpayer is "licensed" to engage in and conduct the business. If the taxpayer fails to secure the permit, he may be enjoined, without notice, from continuance of the business. This section clearly makes payment of all taxes due a condition precedent to continuing to do business in the state. If the tax is not paid, the taxpayer forfeits his right to engage in business until he complies with the law and posts the required bond.

In addition, Section 27-65-85,[18] Mississippi Code of 1972, Vol. 9, p. 73 [Section 10133, Miss. Code of 1942] provides that it shall be a misdemeanor for any person to engage or continue in any taxable business without procuring the "license" required by Section 27-65-27, or after the license has been revoked.

Thus, it is perfectly clear that compliance with the privilege tax statute, including the licensing provisions thereof, is a condition precedent to doing business in Mississippi.

Accordingly, there is no merit in any contention that the tax imposed by Section 27-65-13 is anything other than just what the Mississippi Legislature said that it was—a privilege tax levied on the privilege of engaging in business.

B. This Privilege Tax Is Imposed on Interstate Commerce and Not on Any Local Activity

The Commission has conceded that there is no local activity taxable by this statute connected with the shipment of vehicles by Complete Auto from Jackson, Mississippi, to dealers in other states, and that *Spector* pre-

18. The full text of Section 27-65-85 is set out in Appendix B to this Brief.

vents the Commission from imposing this tax on that transportation.[19] Thus, the Commission has conceded that the tax imposed by Section 27-65-13 was not levied on any local incidents or activities such as the maintenance of personnel or equipment in the state, or doing business in the corporate form in the state, or using the highways of the state,[20] since all of these activities were equally present whether the vehicles were bound to dealers in Mississippi or dealers in other states.[21] This is made crystal clear by the Commission's admissions that the local activity taxed by the statute was "sale of a transportation service being made and performed exclusively within [the] state"[22] and that the "incidence of the tax is on the intrastate sale."[23]

Thus, the Commission's contention that there is a "taxable local activity" is predicated solely on its argument that the transportation of motor vehicles from Jackson to dealer locations in Mississippi is somehow separable

19. Appellee's Brief, at 21 and 27.

20. The Commission has never advanced the contention in this case, and the Mississippi Supreme Court has never held, that this tax is levied on any local activity such as ownership of property or use of the highways.

Mississippi can and does levy other taxes on such local activities. During the years involved in this assessment Complete Auto paid substantial Mississippi income taxes, corporate franchise taxes, license plate fees, and ad valorem taxes (Exhibit C-5, App. 91-93).

21. The dissenting opinion in *Interstate Oil, supra,* 337 U.S. at 669-670, points out that the predecessor of this Mississippi statute (see note 13 *supra*), as construed by the Mississippi Supreme Court, was not levied on any local incidents apart from the flow of interstate commerce. The opinion reasoned that such an interpretation would be inconsistent with the tax immunity which the Mississippi Supreme Court had conceded would be applicable to a pipeline engaged in an interstate business. The plurality opinion found it unnecessary to dispute the question, 337 U.S. at 666.

22. Appellee's Brief, at 19.

23. Appellee's Brief, at 27.

from the general movement of the motor vehicles from the manufacturer to the dealer. However, we submit that it is clear that the character of an interstate shipment is not affected by an interchange from one carrier to another or by the form of the shipping documents. We submit that the truck portion of the transportation was an integral part of the interstate journey and can no more be taxed than could the portion of the rail journey from the Mississippi state line to Jackson.

Accordingly, this tax is not levied for the privilege of engaging in any local activity.

IV. This Case Is Controlled by the Principles Enunciated in Spector and Railway Express I

In the light of the arguments advanced by the Tax Commission in its Brief, we view with some skepticism the Commission's assurance that it "find[s] no fault with *Spector*."[24] For example, the Tax Commission attempts to avoid the clear holding of *Spector* and *Railway Express I* by suggesting that the rule enunciated in those cases should not apply in this instance, where the interstate journey is conducted pursuant to separate shipping documents, since here there is no question of apportionment. The Commission also suggests that the statute is valid as applied to Complete Auto, since it does not discriminate against interstate commerce.[25] *Spector* itself, however,

24. Appellee's Brief, at 24.

25. The Commission has asserted other transporters performing "identical services" were subject to and paid this privilege tax. (Appellee's Brief, at 16). There is no basis in the Record whatsoever to support this assertion. Even if it were true, however, that other transporters performing "identical services" paid this tax (and Complete Auto does not concede the accuracy of the statement), then it is evident that those carriers paid taxes which the state could not constitutionally impose. We fail to

(Footnote continued on following page)

makes it crystal clear that a state lacks the power to levy even a fairly apportioned and nondiscriminatory privilege tax on interstate commerce.

The weakness of the Commission's argument—that *Spector* and *Railway Express I* speak only to "direct interstate shipment" with no change of carrier or documents—is well illustrated by the peculiar result which its application has produced in this situation. Under the Commission's theory, if General Motors had shipped the motor vehicles the entire distance to the Mississippi dealers by Complete Auto, this statute could not be constitutionally applied to any part of the interstate journey. However, so the Commission asserts, because General Motors chose to ship the motor vehicles by rail for a portion of the journey, this tax may be constitutionally applied to the motor carrier portion of the journey.[26]

Whether or not the Tax Commission has urged this Court to overrule *Spector*, it is clear that the Mississippi Supreme Court has already undertaken that task. The

(Continued from previous page)

see how those carriers' election to pay the privilege tax (if indeed privilege taxes were paid by carriers performing identical services) would affect the state's power to impose an unconstitutional tax on Complete Auto.

Moreover, even if a decision in favor of Complete Auto would produce any discrimination in favor of interstate commerce, it was certainly within the power of the state to eliminate or reduce its effect. Indeed, the portion of the statute levying this tax has now been repealed, Mississippi Laws of 1972, Chapter 506.

26. The railroad waybill introduced into evidence (Exhibit C-1-A, App. 19, 20) shows that some of the motor vehicles were transported by the Southern Railway System to Meridian, Mississippi, where they were interchanged with the Illinois Central to continue the transportation to Jackson, Mississippi. (App. 56-57, 66-67). Under the Commission's theory, which attaches great importance to an interchange between carriers, the Commission could have taxed the portion of the rail journey from Meridian to Jackson, since all of the transportation by Illinois Central occurred in Mississippi.

Mississippi Supreme Court did not even attempt to distinguish, or even cite, *Spector* or *Railway Express I*.

We submit that neither the Mississippi Supreme Court nor the Mississippi State Tax Commission has advanced any sound or persuasive ground for removing the application of this privilege tax from the constitutional prohibition imposed by *Spector* and the related cases.

V. Complete Auto Would Be Severely Prejudiced by Retroactive Imposition of This Tax

The Commission's suggestion that Complete Auto will not bear the burden of this tax assessment[27] is completely unsupported and is flatly contradicted by the Record. But for Complete Auto's reliance on established constitutional principles forbidding the imposition of this privilege tax on interstate commerce, Complete Auto would have passed the tax along to General Motors. General Motors might then have passed the tax along to its dealers, although General Motors was not legally required to do so. The dealers might then have passed it along to their customers. The problem is, as pointed out at length in our original Brief, that Complete Auto, in reliance on existing constitutional standards, *did not* collect this tax from General Motors, and the uncontradicted testimony is that the cost will be borne by Complete Auto (App. 88-90).

Affirmance of the decision below would result in the retroactive imposition on Complete Auto of the burden of collecting taxes for the State. Any such departure from the constitutional principles on which Complete Auto relied would place a tremendous hardship on Complete Auto, and on other carriers similarly situated. In effect, it would amount to the imposition of a penalty for failing

27. Appellee's Brief, at 24.

to perform a duty which, at the time when performance was required (and was possible), the State could not constitutionally compel. This clear hardship, and the recognized need for detailed, legislatively established standards to regulate state imposition of privilege taxes, led us to urge strongly in our original Brief that any changes in the existing constitutional standards should be made by Congress, and not by this Court. We further suggested that any changes should not be made retroactively effective.

The Commission, nominally adhering to its position that it finds no fault with *Spector*, has not responded to these points, and we will not belabor them here. Nevertheless, we respectfully submit that the points must be given careful consideration if this Court does what the Commission insists is unnecessary and considers any modification of the rule enunciated and reiterated in *Spector*, *Railway Express I*, and *Colonial Pipeline*.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

ROBERT C. CANNADA
GEORGE H. BUTLER
D. CARL BLACK, JR.
RHESA H. BARKSDALE
ALAN W. PERRY
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Appellant

APPENDIX A

Section 27-65-27, Mississippi Code of 1972, Annotated (recodification of Section 10115, Mississippi Code of 1942).

§ 27-65-27. Permit to engage in business.

Any person who engages, or who intends to engage, in any business or activity which will subject such person to a privilege tax imposed by this chapter, shall apply to the commissioner for a permit to engage in and to conduct any business or activity upon the condition that he shall pay the tax accruing to the state of Mississippi under the provisions of this chapter, and shall keep adequate records of such business or activity as required by this chapter. Upon recepit of such permit, the applicant shall be duly licensed under this chapter to engage in and conduct such business or activity. Said permit shall continue in force so long as the person to whom it is issued shall continue in the same business at the same location, unless revoked by the commissioner for cause.

The commissioner shall require of every person desiring to engage in business within this state, who maintains no permanent place of business within this state, a cash bond or an approved surety bond in an amount sufficient to cover twice the estimated tax liability for a period of three months. Provided, however, that the bond shall in no case be less than one hundred dollars and that the tax may be prepaid in lieu of filing bond if the amount is approved by the commissioner. This bond shall be filed with the commissioner prior to the issuance of a permit to do business and before any such person may engage in business within this state. Failure to comply with the provi-

sion will subject such person to the penalties provided by this chapter.

The commissioner is hereby authorized to revoke the permit of any person failing to comply with any of the provisions of this chapter, after giving to the person holding such permit ten days' notice of the intention of the commissioner to revoke such license. Unless good cause be shown within said ten days why such permit should not be revoked, the commissioner may revoke such permit, and revocation of such permit, or engaging or continuing in business after such permit is revoked, shall subject such person to all the penalties imposed by this chapter.

Any person liable for the tax who fails to obtain a permit from the commissioner, or who continues in business after such permit has been revoked, or who fails to make his returns for taxation as provided, or who fails to keep adequate records and invoices provided by this chapter, or who fails or refuses to permit inspection of such records, or who fails to pay any taxes due hereunder, shall forfeit his rights to do business in this state until he complies with all the provisions of this chapter and until he enters into a bond, with sureties, to be approved by the commissioner, in an amount not to exceed twice the amount of all taxes estimated to become due under this chapter by said person for any three month period, conditioned to comply with the provisions of this chapter, and pay all taxes legally due by him.

If any person is engaged in or continuing in this state in any business or activity without obtaining a permit, or after such permit has been revoked, or without filing a required bond, or without keeping and allowing inspection of all records required by this chapter, or without making a return, or returns, and without paying all taxes due by him hereunder, it shall be the duty of the commissioner

to proceed by injunction to prevent the continuance of said business. Any temporary injunction enjoining the continuance of such business shall be granted without notice by a judge or chancellor now authorized to grant injunctions.

APPENDIX B

Section 27-65-85, Mississippi Code of 1972, Annotated (recodification of Section 10133, Misssissippi Code of 1942).

§ 27-65-85. Penalties for failure to comply with the chapter.

It shall be unlawful for any person to engage or continue in any business for which a tax is imposed by this chapter without procuring a license as required by section 27-65-27 of this chapter, or after such license has been revoked, or who shall fail or refuse to make the return provided to be made in section 27-65-33 of this chapter. It shall be unlawful for any person to make any false or fraudulent return or false statement in any return, with intent to defraud the state or to evade the payment of the tax or any part thereof; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this chapter with the intent to evade the payment of the tax due. It shall be unlawful for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner, or his duly appointed agent, as required by this chapter, includ-

ing the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise whether in regard to his own or another's return; or to fail or refuse to permit the inspection or appraisal of any property by the commissioner or his duly appointed agent; or to refuse to offer testimony or produce any record as required by this chapter. It shall be unlawful for any person using the public roads and highways of this state for the transportation of merchandise for sale, whether such person be a contract carrier or operating a private vehicle, other than a common carrier operating under the interstate commerce commission or the Mississippi public service commission, and having a permanent office in this state where proper records of merchandise transported are kept and available for inspection by the commissioner or his agents, to fail to have in his or her possession at all times while such merchandise is being transported, and allow inspection of, the invoices or sales tickets correctly disclosing the nature and quantity of such merchandise and the consignor and consignee of each article being transported. However, the records of a common carrier shall be open for inspection at any time for the purpose of obtaining any information bearing upon the administration of this chapter. In the case of any vehicle engaged in the transportation of merchandise for sale, neither belonging to nor operated by a regulated common carrier and not keeping complete records in this state, the commissioner or his authorized agents may examine any invoices or sales tickets carried by the person in charge of such vehicle, and may compare them with the character and quantity of merchandise being transported and the consignee thereof, for the purpose of ascertaining whether or not the provisions of law are being complied with. The absence of such invoices or delivery or sales tickets indicating to whom said merchandise belongs, or is to be delivered, in the hands of such

person so engaged in transporting the merchandise, shall be prima facie evidence that such person is transporting such merchandise in violation of this chapter and liable for all penalties imposed under this section.

Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than five hundred dollars, or imprisoned not exceeding six months in the county jail, or punished by both such fine and imprisonment, at the discretion of the court, within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return or statement, with the intent aforesaid shall be guilty of the offense of perjury and, on conviction thereof, shall be punished in the manner provided by law.

The commissioner may require the attendance of any person and take his testimony with respect to any matter pertaining to any taxpayer's liability for taxes under this chapter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper or other data when required to do so, such failure or refusal shall be reported to the attorney general, the district attorney or county attorney, who shall thereupon institute proceedings in the circuit court of the county where such witness resides to compel obedience to any summons of the commissioner, or his authorized agent. Said proceedings shall be by petition for citation to such person refusing to obey such summons, to show cause why such person should not be required to obey such summons; and the circuit judge of the district may hear such petition in term time or vacation upon two days' notice to the person

sought to be cited; and the circuit judge may enter such order as he may deem proper, and punish any failure to comply with such order as for any other contempt of said court. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the justice of the peace courts; and such compensation shall be paid from the proper appropriation for the administration of this chapter.